FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 13 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1949.

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,
Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York in the County of Westchester and Brief in Support Thereof.

HAROLD J. SHERMAN,
Attorney for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

PETI
Ju
Co
Qu
Sta
T
T
T
T
TI
Th
Th
Ba
Speci
Reas
BRIEF O
TIO
Opini
Juris
State
Specif

INDEX.

	PAGE
TITION FOR A WRIT OF CERTIORARI	1
Jurisdiction	1
Convention and Constitution Involved	4
Questions Presented	5
Statement of Matter Involved	8
The Action	8
The Parties	8
The Facts of Petitioners' Cause of Action as Conceded by Respondent	9
The Manner in Which the Federal Questions at Bar Were Raised and Decided	10
The Decisions of Mr. Justice J. Gordon Flannery at Special Term of the New York Supreme Court	13
The Decisions of the Appellate Division	14
The Decision of the New York Court of Appeals	14
Basis of the Decisions in the State Courts	14
Specification of Errors	18
Reasons for Granting the Writ	20
IEF ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI	27
Opinions Below	27
Jurisdiction	27
Statement	28
Specification of Errors	28

PAGE

Argument and Authorities 28

POINT I.—Subdivision (1) of Article 22 of the Warsaw Convention alleged in the third and fourth partial defenses, is void and unenforceable to limit respondent's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves petitioners' absolute right of trial by jury as to all issues of fact herein, including the issue of damages.. 28

The action at bar is a "Suit at Common Law" within the meaning of the Seventh Amendment 33

The constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention under the Seventh Amendment of the United States Constitution, can be tested legally in the instant State Court action at law for damages for the wrongful death of decedent 35

POINT II.—The transportation contract made between decedent, Arthur Albertus Lee, and respondent, pursuant to such Warsaw Convention, as alleged in such fourth partial affirmative defense, being infected at its core with the unconstitutionality of Subdivision (1) of Article 22 of such Warsaw Convention, is likewise void and unenforceable to limit respondent's tortious liability for damages ... 37

POINT III.—Petitioners' decedent did not waive for himself or petitioners the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability in excess of the Warsaw Convention limits 39

PAGE

POINT IV.—The provisions of Subdivision (1) of Article 22 of such Warsaw Convention and its allied Articles 17 and 20, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby. Subdivision (1) of Article 22 and the transportation contract relating thereto are, therefore, void and unenforceable to limit respondent's *tortious* liability for damages 40

Historical considerations impelling acceptance of petitioners' contentions 51

The gross immorality, impolicy, and injustice of the Warsaw Convention's arbitrary restrictions of the *tortious* liability of air carriers 52

POINT V.—The Garcia and the three other Warsaw Convention cases cited by respondent are sui generis and, therefore, none of them is decisive of the distinctly new issues at bar.. 56

The Garcia Case 56

The Wyman Case 57

The Ross Case 58

The Indemnity Insurance Case 58

CONCLUSION 59

APPENDIX A.—Cardinal Canons of Construction controlling Warsaw Convention and transportation contract thereunder A-1

APPENDIX B.—Petitioners' statistical data on aviational progress during past twenty-six year period and specific years thereof B-1

TABLE OF CASES CITED.

	PAGE
Alexander et al. v. Greene, 7 Hill (N. Y.), 533, 566	53
American Railway Express Co. v. Levee, 263 U. S. 19, 20-21	18
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 91	21
Anderson v. Erie R. R. Co., 171 A. D. 687, 693 (3rd Dept., 1916), affd. in 223 N. Y. 277 (1918)	45
Asakura v. Seattle, 265 U. S. 332, 341	30
Atwater & Co. v. Panama R. R. Co., 246 N. Y. 519, 524	App. A-3
Atwood v. The Reliance Transportation Co., 9 Watts (Pa.) 87, 88	41
Baines v. The James & Catherine, 2 Fed. Cases (Case No. 756) 410, 416	33
Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 186-187	46, 47, 53
Baylis v. Travelers Insurance Co., 113 U. S. 316, 321	32
Bell v. Hood et al., 71 Fed. Supp. 813, 816 (U. S. D. C., S. D. Calif., 1947)	30
Bell's Gap Railroad Co. v. Commonwealth of Pennsylvania, 134 U. S. 232, 234	17
Belleavance v. Plastic-Craft Novelty Co. et al., 30 Fed. Supp. 37, 38 (U. S. D. C. D. Mass., 1939)	33-34
Birkett as Admr., etc. v. Knickerbocker Ice Co., 110 N. Y. 504, 508	33
Black v. Goodrich Transportation Co., 55 Wis. 319, 325-326	48
Bothwell, etc. v. B. E. R. Co., 215 Mass. 467, 476 (1913)	32
Bowman v. Mutual Benefit Health & Accident Ass'n., 99 Fed. (2d) 856, 858 (C. C. A. 8th, 1938)	59
Brown v. Piper, 1 Otto (91 U. S.) 37-44	App. B, Title Page
Burrus v. Chicago, etc. et al., 131 Fed. (2d) 532, 534-535 (C. C. A. 10th, 1942), cert. den. in 318 U. S. 773	48

PAGE

Caledonia, The, 157 U. S. 124, 127 46
Capitol Traction Co. v. Hoff, 174 U. S. 1, 7 ..... 32, 35
Carpenter v. B. & A. R. R. Co., 97 N. Y. 494, 497-501 45
Central of Georgia Railway Co. v. Murphey et ano., 113 Ga. 514, 518-519 48
Chapman v. Crane, 123 U. S. 540, 548 17
Chenango Bridge Co. v. Paige et al., 83 N. Y. 178, 191 37
Cherokee Tobacco Case, The, 11 Wall (78 U. S.) 16, 620-621 30
Chesebrough v. Los Angeles, etc., 306 U. S. 459, 463 21
Chicago, Indiana L. Railway Co. v. Hackett, 228 U. S. 559, 566 38
Chicago, R. I. & P. Ry. Co. v. Martin, 59 Kan. 437, 448; 53 Pac. 461, 464-465, aff'd. in 178 U. S. 245 49, 51
Clark et al. v. Geer, 86 Fed. 447, 448-449 (C. C. A. 8th) 36, 40, 49, 50
Clerkship of Circuit Court, Re, 90 Fed. 248, 251, 252 ..... App. A-2
Cleveland, The, etc. v. Blind, 182 Ind. 398, 424; 105 N. E. 483 ..... App. A-2
Collins v. Central Trust Co., 133 Misc. 93, 94 (1928); aff'd. in 229 A. D. 747; aff'd. in 255 N. Y. 590 ..... App. A-2, A-3
Compania de Navigacion La Flesha v. Brauer, 168 U. S. 104, 119-120, 123-124 ..... 41, 42, 43, 46, 52
Conklin v. Canadian-Colonial Airways, Inc., 266 N. Y. 244, 247-248 (1935) 38, 39, 41, 53
Curtiss Wright Flying Service Co. v. Glose, 66 Fed. (2d) 710, 711-713 (C. C. A. 3rd, 1933), cert. den. 290 U. S. 696 ..... 38, 53

Dalton v. Hamilton Hotel Operating Co., Inc., 242 N. Y. 481, 489 (1926) 46
Des Moines Navigation & R. R. Co. v. Iowa, etc., 123 U. S. 552, 555 17
Diedrich et al. v. American News Co., 128 Fed. (2d) 144, 146 (C. C. A. 10th, 1942) 32, 34

PAGE

Dimick v. Schiedt, 293 U. S. 474, 486 32
Dougherty v. Equitable, etc., 266 N. Y. 71, 88 59
Down v. Fromont, 4 Camp. 40-41; 171 Eng. Rep. 13-14 51
Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117, 122, 125-127 47

Ferry Companies v. White, 99 Tenn. 256, 257-272; 38 L. R. A. 427 45
Fleitman v. Welsbach Co., 240 U. S. 27, 29 34
Fox v. Ohio, 5 How. (46 U. S.) 410, 434 30

Galloway v. Erie R. R. Co., 116 A. D. 777, 779 (2nd Dept.), aff'd. in 192 N. Y. 545 ..... App. A-4
Garcia v. Pan American Airways, Inc., 183 Misc. 258, aff'd. in 269 App. Div. 289 (Sec. Dept.), aff'd. without opinion in 295 N. Y. 852; cert. den. for want of final judgment in 329 U. S. 741; and related case in 274 A. D. 996 (Sec. Dept.), leave to appeal denied by Court of Appeals on April 14, 1949, unreported officially, cert. den. finally in 333 U. S. 824 ..... 3, 13, 15, 21, 56
Giblett v. Garrison, etc., 232 N. Y. 618, 619 45
Giddart v. Gladstone, 11 East. 675, 685 ..... App. A-4
Geofrey v. Riggs, 133 U. S. 258, 267 30
Gray v. Gray, 87 N. H. 82, 83, 87, 174 Atl. 508 (1934) 34
Graybar Elec. Co. v. New Amsterdam Cas. Co., 292 N. Y. 246-251 37
Guaranty Trust Co. v. U. S., 304 U. S. 126, 143.. App. A-2

Halley, The (1867-1869), 2 The Law Reports, Privy Council Appeal Cases (Eng.) 193, 203 37
Hamilton v. Erie R. R. Co., 219 N. Y. 343, 350-351, 353 .....40, 42, App. A-1, A-2, A-3
Hartford Fire Ins. Co. et al. v. C. M. & St. Ry. Co., 70 Fed. 201, 205-206 (C. C. A. 8th), aff'd. in 175 U. S. 91 ..... 52, 53
Hasey v. McMullen et al., 109 Minn. 332, 337 39
Hawaii v. Mankichi, 190 U. S. 197, 212 ..... App. A-3
Hesse v. Rath et al., 249 N. Y. 436, 438 ..... 40, App. B, Title Page

PAGE

Hodges v. Easton, 106 U. S. 408, 412 ..... 39, 40
Hooper v. Wells Fargo & Co., 27 Cal. 11, 32 47
Hughes v. Penn. R. R. Co., 202 Pa. 222, 228 (1902) aff'd. in 191 U. S. 477 55

Indemnity Insurance Co. v. Pan American Airways, Inc., 58 Fed. Supp. 338 ..... 21, 58
Inland Waterways Corp. v. Hallett, etc., 52 Fed. (2d) 13, 16 (C. C. A. 8th, 1931) 48

Johnston v. Fargo, etc., 184 N. Y. 379, 385-386 55

Kansas City S. Ry. Co. v. Willsie, 224 Fed. 908, 909-913 47
Keith v. Clark, 7 Otto (97 U. S.) 454 16
Kenny v. N. Y. C. & H. R. R. Co., 125 N. Y. 422, 425-426 ..... 42, 43
Kretschmar, etc. v. City of N. Y., 225 A. D. 761 (Case No. 4, Second Dept., 1928) 32
Kuhlen v. B. & N. S. R. Co., 193 Mass. 341, 342-351 45

La Bourgogne, 144 Fed. 781, 786-787 (C. C. A. 2d, 1906), aff'd. in 210 U. S. 95 42
Larrucea et al., Ex parte, 249 Fed. 981, 983 30
Lau ow Bew v. U. S., 144 U. S. 47, 59 ..... App. A-3
Lee v. The Village, etc., 40 N. Y. 442, 451 45
Livingston v. Mayor of N. Y., 8 Wend. (N. Y.) 85 101 30
Lloyd v. Dollison, 194 U. S. 445, 447 30
Loucks v. Standard Oil Co., 224 N. Y. 99, 106-113 ..... 8, 34, 36, 40
Louisville, New Albany & Chicago Ry. Co. v. Nicholai, 4 Ind. App. 119, 126 48
Lynch v. N. Y. Cent. & H. R. R. Co., 8 A. D. 458, 461-464 45

McCusker v. Curtiss Wright Flying Service, Inc., 269 Ill. App. 502, 527 ..... 59, App. B, Title Page
Maguire v. Tyler, 8 Wall (75 U. S.) 650, 664-665 .. 16
Majestic, The, 166 U. S. 378, 386 46

PAGE

Marchant v. Mead-Morrison M. Co., 252 N. Y. 284, 297-298, rearg. den. in 253 N. Y. 534, appeal dismissed in 282 U. S. 808 17
Millheim v. Moffat, etc., 262 U. S. 710, 716-717 ... 21
Missouri Pac. R. R. Co. v. Boone, 270 U. S 466, 472 (1925) .....App. A-2
Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85, 89 48
Municipal Gas Co. etc. v. The Public Service Commission, 225 N. Y. 89, 96 59

Nashville C. & St. L. R. Co. v. Walters, 294 U. S. 404, 414, 415 59
New Jersey Navigating Co. v. Merchants Bank, 6 How. (47 U. S.) 344, 382-384, 427 ..48, 54, App. A-4
N. Y. Cent. Railroad Co. v. Lockwood, 17 Wall. (84 U. S.) 357, 367, 374, 379-380, 382-383 39, 46, 52, 53, App. A-4
Nicholas et al. v. N. Y. C. & H. R. R. Co., 89 N. Y. 370, 374-375 ..... 42, 47
Norton v. Shelby County, 118 U. S. 425, 442 37

Oceanic Steam Nav. Co. v. Corcoran, 9 Fed. (2d) 724, 727 (C. C. A. 2d, 1925) 52
Olson v. Jordon et al., 181 Misc. 942, 946 (July, 1944) .....App. A-3

Pager v. The Pennsylvania R. R. Co., 165 Fed. (2d) 56 (C. C. A. 2d, Dec. 1947) 52
Panther Rubber Manufacturing Co. v. Commissioners, 45 Fed. (2d) 314, 316 (C. C. A. 1st) 39
Parsons v. Bedford et ano., 3 Pet. (28 U. S.) 433, 445, 447-448 ..... 31, 33
Patrie v. Murray et ano., 43 Barb. 323, 336; 29 How. Pr. 312, aff'd by Gen. Term of the New York Supreme Court in 43 Barb. 337 (cited with approval in Capitol Traction Co. v. Hoff, 174 U. S. 1, 11-13) 32, 35
Patton et al. v. U. S., 281 U. S. 276, 290 32

PAGE

Perkins, etc. v. The N. Y. C. R. R. Co., 24 N. Y. 196, 203, 206, 213-214 ..... 41, 45
Peterson, Ex parte, 253 U. S. 300, 310 31–32
Priestly v. Foulds, 2 Scott N. R. 205, 228 .....App. A-4
Putnam v. B. & S. A. R. R. Co., 55 N. Y. 108, 112-119 45

Ratheon Mfg. Co. v. RCA of America, 76 Fed. (2d) 943, 947 (C. C. A. 1st, 1935), aff'd in 296 U. S. 459 32
Realty Revenue Corporation v. Wilson, etc., 181 Misc. 802, 804 (N. Y. Sup. Ct., Walter, *J.*, 1943) 59
Ribble Nav. Co. v. Hargreaves, 17 C. B. 385, 402..App. A-4
Riggs et al. v. Palmer et al., 115 N. Y. 506, 509..App. A-3
Robostelli v. N. Y. N. H. & H. R. Co, 33 Fed. 796, 801 (U. S. C. C., S. D., N. Y.) 34
Ross v. American Airways, Inc., 299 N. Y. 88 .... 21, 58

St Louis, etc. v. Pitcock, 82 Ark. 441, 447 (1909) 53
St. Louis R. R. v. Terre Haute R. R., 145 U. S. 393, 403-404 59
Saunders v. Southern Railway Co., 128 Fed. 15, 20-23 (C. C. A. 6th, 1904) 48
Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 11 16
Schnell v. Vallescura, 293 U. S. 296, 303-304 41
Seaboard Airline Railway v. Duvall, 225 U. S. 477, 487-488 17
Senn v. Tile, Etc., 301 U. S. 468, 476-477 21
Shaw v. C. & G. T. R. Co., 123 Mich. 629, 631-637 45
Shields v. Thomas et al., 18 How. (59 U. S.) 253, 262 33
Siebold, Ex parte, 100 U. S. 371, 376 38
Slater v. Mexican National R. R. Co., 194 U. S. 120, 126 ..... 8, 34
Smith v. American National Bank, 89 Fed. 832, 838, (C. C. A. 8th) 30
Smith, etc. v. N. Y. C. R. R. Co., 29 Barb. 132, 137-142, aff'd in 24 N. Y. 222, 231-236 ..... 52, 54
Smyth Sales, Inc. v. Petroleum Heat & Power Co., Inc., 141 Fed. (2d) 41, 44-45 (C. C. A. 3d, 1944) 32

PAGE

State, etc. v. Kohler, 200 Wis. 518, 561; 69 A. L. R. 348, 371 (1930) 32
Steamboat Co. v. Brockett, 121 U. S. 637, 645-646 45
Stewart v. B. & C. R. R. Co., 90 N. Y. 588, 591, 594 47
Stowbridge Canal Co. v. Wheeley, 2 B. & Ad. 792 .....App. A-4
Sullivan v. Kidd et al., 254 U. S. 433, 439 .....App. A-3

Thomas v. Gay, 169 U. S. 264, 271 30
Thrasher v. City of Atlanta et al., 178 Ga. 514, 517 (1933) .....App. B, Title Page
Thurlow v. Moss, 5 How. (U. S.) 505, 613 30
Tucker v. Alexandroff, 183 U. S. 424, 437 ..42, App. A-1, A-2

Union Pac. R. R. Co. v. Burke, 255 U. S. 317, 321, 323 ..... 38, 41
U. S. v. D. & H. Co., 213 U. S. 366, 412 .....App. A-3
U. S. v. Gue Lim, 176 U. S. 459, 467 .....App. A-3
U. S. v. 18 Packages, etc., 230 Fed. 564, 569 (C. C. A. 3rd), appeal dismissed in 242 U. S. 617 31
U. S. v. 130 Barrels of Whiskey, 27 Fed. Cases (Case No. 15, 938) 281-282 31
U. S. v. Rathbone, 27 Fed. Cases (Case No. 16121) 711, 712 39
U. S. v. Seufert, etc., 233 Fed. 579, 582 (U. S. D. C. Oregon), aff'd in 249 U. S. 194 ....App. A-1, A-2, A-3

Valentine, etc. v. U. S., 299 U. S. 5, 10 30–31
Van Beeck v. Sabine Towing Co., 300 U. S. 342, 348-351 ..... 36, 40

Ware v. Regent's Canal Co., 28 L. J. Ch. 153, 157 .....App. A-4
Weatherbee v. Johnson et ano., 14 Mass. 412, 415, 421 (cited with approval in Capitol Traction Co. v. Hoff, 174 U. S. 1, 11-13) 35
Wells et al. v. Steam Navigation Co., 8 N. Y. (4 Seld.) 375, 379 ..... 46, 47
Wheeler v. O. S. N. Co., 125 N. Y. 155, 160-161.... 42
Wheelock v. Lee, 74 N. Y. 495, 501 39

PAGE

Whitehead v. Shattuck, 138 U. S. 146, 151 33
Wilkinson, etc. v. Boehm, et al., 231 A. D. 295, 296 (3rd Dept., 1931) 32, 33
Wright v. Henkel, 190 U. S. 40, 57 .....42, App. A-1
Wyman v. Pan American Airways, Inc., 181 Misc. 963, aff'd without opinion in 267 App. Div. 947 (1st Dept.) aff'd without opinion in 293 N. Y. 878, cert. den. in 324 U. S. 882 ..... 21, 57

Zalewsky, Re, 292 N. Y. 332, 336-337 ....42, App. A-1, A-2

OTHER AUTHORITIES CITED.

Air Commerce Bulletin, Vol. 9, No. 11, May 15, 1938 .....App. B-2

American Jurisprudence
Vol. 10, p. 121, §1149 .....48, App. A-4
Vol. 10, pp. 256-259 45
Vol. 10, pp. 263-264, §§1447-1448 47
Vol. 11, p. 296, §3 35
Vol. 12, pp. 772-777 .....App. A-2, A-3
Vol. 16, p. 233, §348 33
Vol. 16, p. 234, §352 33
Vol. 16, p. 253, §389; id. p. 255, §390 8
Vol. 31, p. 552, §3 32
Vol. 31, pp. 556-557, §7 31
Vol. 31, p. 557, §8 33
Vol. 50, p. 376, §370; id. 332-336; §339, et seq. .....App. A-2
Vol. 50, p. 385, §377 .....App. A-2

American Law Institute's Restatment, Conflict of Laws (1934 Ed.) §5, p. 9 34
Annals of Congress, Vol. 1, pp. 424, 435 31
Beale, "Conflict of Laws", Vol. One (1935 Ed.) pp. 52-53 ..... 8, 34
Broom's Legal Maxims (10th Ed. 1939) p. 1, 389-391, 394, 408 .....61, App. A-3, A-4

PAGE

Bouvier, Vol. 2 (Rawle's Revis.), p. 348 ..... App. A-2
Cardozo, Benjamin N., "The Nature of the Judicial Process" (1921 Ed.), p. 66 61
Carmody's New York Practice, Vol. 6 (2nd Ed.) §626, p. 555 17
Civil Practice Act of New York, Section 476 13
Clark's New York Law of Contracts, Vol. 1 (1922 Ed.) p. 626, §401 38
Congressional Record, Vol. 78, Pt. 11, pp. 11561, 11577-11582 (73rd Cong., 2nd Sess.) 29

Constitution of the United States:
Art 1, Sec. 8, Cl. 3 ..... 56, 58
Art. 2, Sec. 2, Cl. 2 30
Art. 3, Sec. 2 ..... 4, 27
Art. 6, Cl. 2 61
Fifth Amendment 56, 58
Seventh Amendment 5, 6, 7, 12, 16, 18, 19, 21, 22, 23, 28-36, 39-40, 56-57, 60

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929 (49 U. S. Stat. Part II, p. 3000) 3-7, 10-12, 16, 18-26, 28-29, 31, 36-41, 43-47, 49-50, 55-60
Cooley on Constitutional Limitations, Vol. 1 (8th Ed.) pp. 382-384 38

Corpus Juris:
Vol. 12, p. 801, §230 38
Vol. 12, p. 432, §2 34
Vol. 17, p. 1057, §361 32
Vol. 35, p. 202, §11, left col. 39, 60-61
Vol. 35, p. 147, §12, right col. 39
Vol. 59, p. 1009 ..... App. A-2
Vol. 67, p. 298 39

Corpus Juris Secundum, Vol. 13, pp. 1294-1296 ... 45
Dicey, Conflicts of Law (5th Ed. 1932) p. 77 8
Encyclopedia Britannica, Vol. 2 (1942 Ed.) pp. 804-805 ..... 60, App. B-1

PAGE

Encyclopedia Britannica Book of the year, 1946..App. B-3
Funk & Wagnalls' New Standard Dictionary (1941 Ed.) 49
Hamilton's Works, Vol. 4, p. 342 30
Holdsworthy's History of English Law, Vol. 5, (1924 Ed.) p. 26 35
Jefferson, Thomas, Writings of (Washington Ed.), p. 71, Vol. 3 32
Journal Air Law, Vol. 1, p. 376 25

Kent's Commentaries:
Vol. 2 (11th Ed.), p. 454 34
Vol. 1 (11th Ed.), pp. 1, 342-343, 473-474 35
Vol. 2 (14th Ed.), pp. 607-608 51

Moore on Carriers, Vol. I (2nd Ed., 1914), pp. 428, 438, 463, 472-473, 497, 517-519 ..... 41, 48, 51, 52
Moore's International Law Digest, Vol. V (1906 Ed.) pp. 178-179, §738 31

New York Rules of Civil Practice:
Rule 109 11
Rule 112 13
Rule 113 13

Ohlinger's Federal Practice, Vol. I (Rev. Ed. 1949) p. 508 [28:1257 (4)] 21
Restatement of the Law of Conflicts of Law, Am. Law Institute, pp. 479-480, §391; id. pp. 493-494, §412; id. p. 9, §5 ..... 8, 34
Richardson on Contracts (1926 Ed.), p. 144, §171.. 53

Ruling Case Law:
Vol. 4, p. 1184, §606-607 45
Vol. 16, p. 193, §13 32
Vol. 16, p. 195, §14 33
Vol. 16, p. 197, §15 31
Vol. 16, p. 215, §32 32
Vol. 16, p. 217, §34 ..... 40, 60

PAGE

Shearman & Redfield on Negligence, Vol. 13 (Rev. Ed. 1941) §494, pp. 1232-33, §511, pp. 1298-99, §512, p. 1300 ..... 52, 53
Story on Bailments (8th Ed.) §591, pp. 580-581 53
Story's Commentaries on the Constitution (5th Ed. 1905), §1508 30
Sutherland's Law of Damages (4th Ed.) Vol. 1, p. 21, §6 ..... 36, 40
Sutherland's Statutory Construction, Vol. 3 (3rd Ed. 1943), p. 125, §5901; pp. 130-131, §5903.. App. A-2, A-3
Title 28, United States Code:
Section 1257 ..... 4, 27
Section 2101 3
Wharton's Law Lexicon (14th Ed., 1938) p. 222, right col. 35
Williston on Contracts (Rev. Ed., 1936):
Vol. 3, §618, pp. 1779-1780 ..... A-2, A-3
Vol. 6, §1751C, p. 4968 54
World Almanac, 1942, pp. 277, 280 ..... App. B-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

AGAINST

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York in the County of Westchester.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mary Elizabeth Lee, Mary Elizabeth (Betty) Lee, and William Clair Lee respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeals, the highest court of the State of New York, entered on the 23rd day of November, 1949, (R. 152) upon the remittitur of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, and the final judgment entered, (R. 1-83, 154) upon such final order and remittitur, on the 12th day of December, 1949, in the office of the Clerk of the Supreme Court of the State of New York, in the County of Westchester.

Jurisdiction.

By an order dated December 19th, 1947, Mr. Justice J. Gordon Flannery, at Special Term of the New York

Supreme Court, granted (R. 8-9) a motion for the dismissal of petitioners' claim to the extent that it substantially exceeds the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars. Final judgment was entered (R. 6-7) upon such order in the office of the Clerk of the New York Supreme Court, County of Westchester, on the 22nd day of December, 1947.

Subsequently and on January 21st, 1948, petitioners appealed (R. 4-5) to the Appellate Division of the New York Supreme Court, Second Judicial Department, from such judgment and the orders preceding it. On May 24th, 1949, the Appellate Division unanimously affirmed (R. 81-82; 275 A. D. 855, Case No. 1) such judgment and orders. The remittitur of the Appellate Division (R. 1-83) was filed in the office of the Clerk of the New York Supreme Court in Westchester County on the 2nd day of June, 1949. And on the same day, namely, the 2nd day of June, 1949, a judgment of affirmance (R. 83-84, 140) was entered on such remittitur in the office of such Clerk of the New York Supreme Court in the County of Westchester.

In June, 1949, petitioners made a motion (R. 85-115) before such Appellate Division for an order granting them leave to appeal to the New York Court of Appeals. Such motion was denied (R. 121-122) by such Appellate Division on the 28th day of June, 1949 (275 A. D. 962, Case No. 2).

A copy of the order of such Appellate Division, denying leave to appeal to the Court of Appeals, was served on petitioners' attorneys on the 17th day of October, 1949. This was done pursuant to the terms of a certain written stipulation dated June 24th, 1947 between petitioners and respondent (R. 142-143).

Although, as is hereinafter demonstrated, the instant case involves novel legal questions never before determined by this Court or any other court, State or Federal, anywhere in the United States, petitioners and respondent, by their aforementioned stipulation (R. 142-143), agreed

to await the final outcome in the *Garcia* case* before the initiation of the further proceedings in this case. For, obviously, a reversal by this Court of the decisions of the New York Courts in the *Garcia* case, upholding the limitation of liability of common air carriers as fixed in the Warsaw Convention (49 U. S. Stats. Part II, pp. 3000, 3019), would have enured to the benefit of petitioners herein and would have rendered academic the extraordinary legal questions herein raised by them.

On October 10th, 1949, this Court finally denied (338 U. S. 824) the petition for a writ of certiorari for a review of the decisions of the New York Courts in that case.

Thereafter, and on November 2nd, 1949, petitioners applied to the Court of Appeals for leave to appeal to that Court (R. 123-145). On November 23rd, 1949, the Court of Appeals denied leave to appeal to petitioners R. 152; 300 N. Y. (Dec. 31, 1949 Wkly Adv. Shts.) p. i foll. p. 545).

With the entry of the final order of the Court of Appeals (R. 152) on November 23rd, 1949 and the entry of the final judgment (R. 154) upon such final order of the Court of Appeals, and upon the aforementioned remittitur, on the 12th day of December, 1949, in the office of the Clerk of the New York Supreme Court in Westchester County, this litigation finally terminated in the Courts of New York.

The filing of the instant petition and supporting brief, together with a certified transcript of the record of all the proceedings herein, in this Court, is within the ninety day period specified in Section 2101 of Title 28 of the United States Code.

---

*183 Misc. 258, affid. in 269 App. Div. 289 (Sec. Dept.), affd. without opinion in 295 N. Y. 852, cert. den. for want of final judgment in 329 U. S. 741; and related case in 274 A. D. 996 (Sec. Dept.), leave to appeal denied by Court of Appeals on April 14th, 1949, unreported officially, cert. den. finally in 338 U. S. 824.

The jurisdiction of this Court is invoked under Article 3, Section 2 of the United States Constitution and Section 1257 of Title 28 of the United States Code.

Convention and Constitution Involved.

This case involves the "Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929" (49 U. S. Stats., Part II, pp. 3000, 3019) also known as the "Warsaw Convention". However, petitioners have not at any time attacked, nor do they now seek to attack, the constitutionality and validity of the *entire* Warsaw Convention. Their objective was, and still is, limited to challenging and testing the alleged constitutionality and validity, of only *a part* of the Warsaw Convention, to wit: Subdivision (1) of Article 22 thereof, upon certain *new grounds*. Its provisions are as follows (49 U. S. Stats., Part II, pp. 3000, 3019):

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Apart from petitioners' first major contention of the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, and solely with reference to their second major contention of the invalidity, as a matter of correct legal construction, of the above quoted *portion* of the Warsaw Convention, there are two other closely allied segments of the Warsaw Convention to be considered by this Court. These are Article 17 and Subdivision (1) of Article 20 (49 U. S. Stats., Part II, 3013, 3018-3019). Their provisions are:

"Article 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

"Article 20

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Petitioners' first major contention is predicated directly on the Seventh Amendment of the United States Constitution. Its pertinent provisos are as follows (U. S. C. A. Const. Amends., p. 379):

"Amendment VII—Civil Trials

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *."

Questions Presented.

The principal question under the Seventh Amendment is as follows:

1. Does the provision of Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019) for the limitation of the tortious liability of air carriers to the sum of 125,000 francs or the equivalent of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, as applied by the Special Term and the Appellate Division of the New York Supreme Court, to the undisputed facts of peti-

tioners' claim for damages substantially in excess of such limited sum, deprive petitioners of any property and civil rights in violation of the Seventh Amendment of the Constitution?

Several subsidiary questions relative to the application of the Seventh Amendment in the case at bar, are as follows:

2. Is the instant action at law of petitioners to recover damages in full from respondent, Pan American Airways, Inc., by reason of the wrongful death of decedent within the territorial jurisdiction of Portugal a "suit at common law" within the meaning of the Seventh Amendment of the Constitution?

3. Can the constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention under the Seventh Amendment of the Constitution be tested legally in the instant State Court action at law for damages for the wrongful death of the decedent?

4. If Subdivision (1) of Article 22 of the Warsaw Convention is unconstitutional as violating the Seventh Amendment of the United States Constitution, does its unconstitutionality *per se* operate to render void and unenforceable the limitation of respondent's tortious liability as expressly incorporated by reference to the Warsaw Convention in the transportation contract at bar between petitioners' decedent and respondent?

5. If Subdivision (1) of Article 22 of the Warsaw Convention is unconstitutional as violating the Seventh Amendment of the Constitution, and if its unconstitutionality *does not per se* render void and unenforceable the limitation of respondent's tortious liability as expressly incorporated by reference to the Warsaw Convention in the transportation contract at bar between petitioners' decedent and respondent, does such contractual limitation of the tortious liability of respondent validly operate to limit the damages re-

coverable by petitioners to the amount awarded in the judgment, notwithstanding that admittedly (R. 48-49) respondent failed to offer decedent a choice between a lower fare and the maximum fare and a corresponding election between the lower liability and the maximum liability, or any special contract for higher liability? (see pp. 22-23, 38, *infra*).

6. Upon the record herein undisputedly demonstrating (R. 48-49) that respondent, Pan American Airways, Inc., failed to offer to petitioners' decedent a choice between a lower and a higher fare and between a correspondingly reduced and maximum tortious liability, or any *real consideration* for limited tortious liability or any special contract for higher tortious liability, did petitioners' decedent in entering into the transportation contract at bar with respondent, pursuant to the Warsaw Convention, and in purchasing international transportation thereunder on respondent's airplane, for the maximum chargeable fare, waive any rights which he may have had under the Seventh Amendment, to enforce respondent's tortious liability in excess of the amount prescribed in the Warsaw Convention?

7. Upon the record herein, if the answer to preceding question number 6 is in the affirmative, does such waiver by decedent operate to conclude any rights which petitioners may have, individually, under the Seventh Amendment to enforce respondent's tortious liability for damages in excess of the amount prescribed in the Warsaw Convention?

Another question of major importance, but wholly independent of the crucial legal effect of the Seventh Amendment on Subdivision (1) of Article 22 of the Warsaw Convention, is as follows:

8. Are the provisions of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20, and as incorporated in such transportation

contract, fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby and, upon such grounds, void and unenforceable to limit respondent's tortious liability to petitioners for damages for the wrongful death of decedent?

STATEMENT OF MATTER INVOLVED.

The Action.

Petitioners instituted this action in the New York Supreme Court in the County of Westchester on or about the 30th day of November, 1943, by the service of process and a verified complaint upon the respondent (R. 50-59). In essence, the action is one strictly *ex delicto* for the recovery of damages substantially exceeding the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, as awarded to petitioners in the judgment (R. 6-7) herein, from respondent for the wrongful death of petitioners' decedent, Arthur Albertus Lee, within the territorial jurisdiction of the Republic of Portugal.

It is predicated and proceeds upon the established principles of Common Law Private International Jurisprudence or Conflicts of Law.

[N. B. Such principles of private international law are enunciated in 16 Am. Jur. 253, §389; id. 255, §390; Restatement of the Law of Conflicts of Law, Am. Law Institute, pp. 479-480, §391; id. pp. 493-494, §412; Professor Beale's Conflicts of Law (1935 Ed.) Vol. 1, p. 52, §5.2; Professor Dicey's Conflicts of Law (5th Ed. 1932) p. 77; *Slater* v. *Mexican National RR. Co.*, 194 U. S. 120, 126, opinion by Holmes, *J.*; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 106-113, Opinion by Cardozo, *J.*]

The Parties.

Petitioners, Mary Elizabeth Lee, Mary Elizabeth (Betty) Lee, and William Clair Lee, are respectively the surviv-

ing widow, daughter, and son of the late Arthur Albertus Lee, the unfortunate victim of an airplane disaster hereinafter adverted to. They are citizens of the State of New York and residents in Westchester County thereof. Prior to and at the time of his sudden and untimely decease, the late Arthur Albertus Lee was likewise a citizen of the State of New York and a resident in Westchester County. He was a man of substantial means, unique capabilities, and high standing as a successful business executive in the motion picture industry in the United States and abroad (R. 20, 25, 58).

Respondent, Pan American Airways, Inc., is a New York corporation engaged in the business of a common carrier of passengers for hire by means of aircraft or flying boats from various places in the United States to various countries of the world. It owned, maintained, operated and controlled the "Yankee Clipper", the airplane or flying boat described in the complaint (R. 25, 51).

The Facts of Petitioners' Cause of Action as Conceded By Respondent.

On or about the 22nd day of February, 1943, Arthur Albertus Lee was riding as a regular fare-paying passenger on board respondent's airplane or flying boat "Yankee Clipper", which was then flying across the Atlantic Ocean from LaGuardia Airport, in New York, New York, to an airport in Lisbon, Republic of Portugal. While it was thus proceeding in flight, such flying vehicle crashed with great force and violence into the Tagus River, in the landing area of the airport at and within the territorial limits of Lisbon, Portugal. As a result of such accident, Arthur Albertus Lee was killed (R. 26, 52, 60).

This terrible disaster was due to the *negligence* of respondent and its agents in the maintenance and management and operation of the "Yankee Clipper" (R. 21, 26-27, 56-58).

By the laws of the Republic of Portugal at the time and the place of such accident, liability was created and

imposed upon respondent for its wrongful and negligent conduct in connection with the untimely and tragic death of the late Arthur Albertus Lee. And by such foreign laws at the *locus in quo*—Portugal not being a signatory or adhering party to the Warsaw Convention—the rights to claim and sue for, as well as receive, all monetary damages—*with no limitation thereon*—sustained by petitioners as surviving widow and next of kin of such decedent in the premises, became vested directly in them in their respective individual capacities for their entire personal benefit, to the exclusion of the estate and creditors of such decedent (R. 21-22, 26-27, 52-56). Such damages of petitioners are substantially in excess of the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 6-7), the amount awarded to them in the judgment herein, as prescribed in the Warsaw Convention.

Other significant facts are these: Respondent never offered decedent, in any manner or form whatsoever, a choice between a lower and a higher rate of fare and a corresponding election between a lower limit of liability and maximum liability for accidental hazards to his person in connection with his transportation on respondent's airplane or flying boat "Yankee Clipper". Nor, for that matter, did respondent offer decedent any *special contract* for *any higher* liability whatsoever. Respondent charged decedent and decedent paid to respondent only the regular and uniformly fixed fare chargeable for his aforementioned transportation aboard such "Yankee Clipper" (R. 48-49).

All the foregoing facts are admitted by respondent (R. 20-23, 27-28, 48-49, 51-59, 60).

The Manner in Which the Federal Questions at Bar Were Raised and Decided.

In its answer, however, respondent directly invoked and set up, as its alleged third partial affirmative defense, the very substantial—though not total—immunity from *tortious* liability as provided in the Warsaw Con-

vention of October 29th, 1929 (49 U. S. Stats. Part II, 3000, 3019) originally between only twelve foreign countries of the world, and to which the United States "adhered" in 1934. It substantially pleaded (a) that decedent's transportation in the course of which he met his death, was made by respondent under a contract between decedent and respondent, (b) that such transportation was international within the purview of and subject to such Warsaw Convention, (c) that the rights of the parties are controlled by the provisions of such Warsaw Convention, and (d) that by the operation and legal effect of such Warsaw Convention *per se,* the liability of respondent to petitioners is limited to the sum of 125,000 French gold francs, or the equivalent of only the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 61-62, 67-68).

In its answer, respondent also pleaded, as the basis of its alleged fourth partial affirmative defense, that a certain contract was made between decedent and respondent in New York (R. 65-66), (a) that decedent's transportation in the course of which he met his death, was effected by respondent under such contract, and a certain flight coupon issued thereunder, (b) that by the terms of such contract and flight coupon such transportation was international within the purview of and subject to such Warsaw Convention as incorporated and made a part of such contract, (c) that by the operation and legal effect of the terms of such contract *per se* the rights of the parties are controlled by the provisions of such Warsaw Convention and accordingly that respondent's liability to petitioners is limited to the sum of 125,000 French gold francs or the equivalent of only the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 62-68).

On or about March 10th, 1947, petitioners instituted a motion, pursuant to Rule 109 of the Rules of Civil Practice of New York, at Special Term, in the New York Supreme Court, for an order striking out the aforementioned

third and fourth partial affirmative defenses alleged in respondent's answer, as insufficient in law. The grounds for such motion, as particularly expressed in petitioners' formal notice thereof (R. 45-46) were:

> "I.—Subdivision (1) of Article 22 of the Warsaw Convention alleged in the Third and Fourth Partial Defenses is void and unenforceable to limit defendant's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves plaintiffs' absolute rights of trial by jury as to all issues of fact herein, including the issue of damages;
>
> "II.—The transportation contract made between decedent, Arthur Albertus Lee, and defendant, pursuant to such Warsaw Convention, as alleged in such Fourth Partial Affirmative Defense, being infected at its core with the unconstitutionality of Subdivision (1) of Article 22 of such Warsaw Convention, is likewise void and unenforceable to limit defendant's tortious liability for damages;
>
> "III.—The provisions of Subdivision (1) of Article 22 of such Warsaw Convention, and its allied Articles 17 and 20, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of defendant and as to the persons affected thereby. Subdivision (1) of Article 22 and the transportation contract relating thereto, as alleged in such Third and Fourth Partial Affirmative Defenses, are, therefore, void and unenforceable to limit defendant's tortious liability for damages;"

Obviously, then, it is by that initial motion that petitioners directly and expressly raised the distinctly new constitutional and various other new Federal questions at bar in respect to the aforementioned alleged defenses as based upon such Warsaw Convention.

The Decisions of Mr. Justice J. Gordon Flannery at Special Term of the New York Supreme Court.

Such motion was heard by Mr. Justice J. Gordon Flannery at Special Term in the New York Supreme Court on May 28th, 1947. Shortly thereafter, on June 3rd, 1947, Mr. Justice J. Gordon Flannery rendered a decision without opinion, denying it (R. 70). The jurist merely cited "*Garcia* v. *Pan American Airways,* 269 App. Div., 287, 292, aff'd 295 N. Y. 852" (R. 70). And this, notwithstanding that respondent's counsel, Mr. Donald Havens, had made the following concessions in open Court (R. 31-32):

> "In all fairness to Mr. Sherman, I want to say that he on behalf of plaintiffs, is urging brand new arguments which were not involved in the *Garcia* case. One can only speculate whether the Court of Appeals, if it had my opponent's new arguments before it, would have decided the *Garcia* case otherwise than it did. The point is, the Court of Appeals upheld the constitutionality and validity of the Warsaw Convention."

Subsequently, in September, 1947, respondent moved at Special Term of the New York Supreme Court, pursuant to Rules 112 and 113 of the Rules of Civil Practice of New York and Section 476 of the Civil Practice Act of New York, for an order dismissing petitioners' claim to the extent it exceeds the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, and otherwise granting judgment in favor of petitioners for no more than such amount (R. 2, 10-23). That motion, too, came on before Mr. Justice J. Gordon Flannery, at Special Term, in the New York Supreme Court on November 24th, 1947 (R. 2, 6). Two days later, on November 26th, 1947, Mr. Justice J. Gordon Flannery granted it, without opinion (R. 2, 42), presumably upon the theory

that the disposition of petitioners' prior motion constituted "the law of the case".

Thereafter, and in due course, petitioners appealed to the Appellate Division of the New York Supreme Court (R. 4-5). Upon the oral argument of the appeal, respondent's counsel, Mr. Donald Havens, in response to pointed questions from Mr. Presiding Justice Gerald Nolan, again candidly admitted that "the legal questions raised by plaintiffs are novel, having never before been presented to any other court in the State of New York or any other state of the United States" (R. 136).

The Decisions of the Appellate Division.

On May 24th, 1949, the Appellate Division unanimously affirmed, without opinion and without citation of authority, the original orders and judgment herein (R. 81-82, 275 A. D. 855, Case No. 1). And on the 27th day of June, 1949, the Appellate Division also denied, without opinion, petitioners' application for leave to appeal to the Court of Appeals (R. 121-122; 275 A. D. 962, Case No. 2).

The Decision of the New York Court of Appeals.

Precisely on the sixteenth day following the service by respondent of a copy of the order, with notice of entry thereon, denying petitioners' application for leave to appeal to the Court of Appeals, petitioners moved directly in the Court of Appeals (R. 123-145) for leave to appeal to that Court from the aforementioned orders and judgment of affirmance. Such motion was denied without opinion on November 23rd, 1949 (R. 152; 300 N. Y. (Dec. 31, 1949 Wkly Adv. Shts.) p. i, foll. p. 545).

Basis of the Decisions in the State Courts.

Unfortunately, because no opinion was written by any of the Courts of the State of New York in support of their decisions, the precise grounds thereof are unknown.

Inasmuch as Mr. Justice J. Gordon Flannery merely cited in support of his decision (R. 70) the *Garcia* case, his decision may possibly be explained as indicating an attitude that the *Garcia* case should, as intimated in the oral argument before him by respondent's counsel, be deemed to "control" tentatively the case at bar at least until the Court of Appeals has had the opportunity of considering and authoritatively deciding the novel, momentous, and complex federal legal questions as raised by petitioners.

Since the decision of the Appellate Division (275 App. Div. 855, Case No. 1) was not accompanied with any citation of authority in its support, it is, of course, difficult to explicate precisely such decision. It is not inconceivable, however, that the Appellate Division, too, in accordance with the suggestion of respondent's counsel (R. 136), concluded that because of the extraordinary character, profundity, and importance of such federal legal questions, the case at bar should be regarded as tentatively "controlled" by the *Garcia* case until a review and authoritative determination by the Court of Appeals of such federal legal questions.

The decision (R. 152) of the Court of Appeals denying leave to petitioners to appeal to that Court is, likewise, a matter of speculation as to its precise underlying reasons. The Court of Appeals, likewise, may have thought that, in view of its own decision (295 N. Y. 852) in the *Garcia* case upholding as valid the limitation of the tortious liability of air carriers as prescribed in the Warsaw Convention, the *Garcia* case should govern the case at bar until this Court, as ultimate guardian of the rights of all persons under the Constitution, treaties, and other laws of the United States, should determine to review and decide the concededly novel federal questions at bar.

Irrespective of the unknown particular reasons which may have been assigned for the decisions of the State Courts, there is *no uncertainty* whatever as to the basic legal effect of such decisions for the purpose of affording

jurisdiction to this Court to grant a writ of certiorari herein.

Clearly, the record at bar is consistent exclusively with implications necessarily arising therefrom that the Special Term and the Appellate Division of the New York Supreme Court could not have made their decisions, orders, and judgment herein——

> (a) without deciding adversely to petitioners one or more of the first seven federal questions (*vide* pp. 5-7, *supra*) embracing the application and legal effect of the Seventh Amendment of the United States Constitution on the purported limitation of liability of air carriers in Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019), and
>
> (b) without also deciding adversely to petitioners the entirely independent eighth federal question (*vide,* pp. 7-8, *supra*) which challenges the validity of that very same *portion* of the Warsaw Convention as a matter of correct legal construction.

Plainly, no other defenses or matters pleaded in respondent's answer (R. 60-69) entered into such decisions of the Special Term and the Appellate Division. And no presumption whatever can arise in this Court that the Special Term and the Appellate Division rendered their decisions on "some other ground not found in the record or suggested in that Court". (*Keith* v. *Clark,* 7 Otto [97 U. S.] 454; *Cf. Maguire* v. *Tyler,* 8 Wall. [75 U. S.] 650, 664-665.)

In *Schlemmer* v. *Buffalo R. & P. R. Co.,* 205 U. S. 1, 11, this Court, by Holmes, *J.*, stated:

> "We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached

its judgment without *tacitly*, if not expressly, deciding the federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907, 204 U. S. 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukaunana Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254." (Emphasis supplied.)

Accord: *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 232, 234; *Seaboard Airline Railway* v. *Duvall*, 225 U. S. 477, 487-488.

And in *Chapman* v. *Crane*, 123 U. S. 540, 548, this Court pronounced the following:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by *evading* a direct decision thereon as by positive action. If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused." (Emphasis supplied.)

To the same effect: *Des Moines Navigation & R. R. Co.* v. *Iowa, etc.*, 123 U. S. 552, 555.

So far as concerns the decision herein (R. 152) of the Court of Appeals, it is established under the local New York law that a "denial of a motion for leave to appeal is not equivalent to an affirmance" of the order and judgment sought to be reviewed. (*Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284, 297-298 [Cardozo, *Ch. J.*] rearg. den. in 253 N. Y. 534, appeal dismissed in 282 U. S. 808; 6 Carmody's New York Practice [2nd Ed.] §626, p. 555.) Nonetheless, it suffices that for the purpose of giv-

ing this Court jurisdiction to issue a writ of certiorari herein, the decision of the Court of Appeals represents a declination of that Court as the highest Court of the State of New York to entertain a review of the federal matters in this case and is indicative of the fact that petitioners have exhausted their remedies of appeal in the State Courts (*American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20-21 [Holmes, *J.*].)

Specification of Errors.

The Special Term and the Appellate Division of the New York Supreme Court erred as follows:

1. In refusing to hold that Subdivision (1) of Article 22 of the Warsaw Convention arbitrarily, in contravention of the Seventh Amendment of the United States Constitution, deprives petitioners of their civil rights and property in their claim for damages substantially in excess of the sum of 125,000 francs or the equivalent of $8,291.87, as prescribed in such provision of the Warsaw Convention;

2. In refusing to hold that petitioners' instant action at law to recover damages in full from respondent, Pan American Airways, Inc., by reason of the wrongful death of decedent within the territorial jurisdiction of Portugal, is a "suit at common law" within the meaning of the Seventh Amendment of the United States Constitution;

3. In refusing to hold that the constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, under the Seventh Amendment of the United States Constitution, can be tested legally in the instant State Court action at law for damages for the wrongful death of decedent;

4. In refusing to hold that petitioners' decedent, in entering into the transportation contract at bar with respondent, pursuant to the Warsaw Conven-

tion, and in purchasing international transportation thereunder on respondent's airplane, did not waive any rights which he may have had under the Seventh Amendment to enforce respondent's tortious liability in excess of the amount prescribed in the Warsaw Convention, upon the undisputed facts (R. 48-49) showing that respondent, Pan American Airways, Inc., failed to offer decedent a choice between a lower and a higher fare and between a correspondingly reduced and maximum tortious liability, or any real consideration for tortious liability or any special contract for higher liability;

5. In refusing to hold that no such waiver by decedent of his aforementioned rights under the Seventh Amendment operates to conclude any rights which petitioners may have individually under the Seventh Amendment to enforce respondent's tortious liability for damages in excess of the amount prescribed in the Warsaw Convention, assuming *arguendo,* but without conceding, such waiver on the decedent's part exists;

6. In refusing to hold that the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, *per se,* operates to render void and unenforceable the limitation of respondent's tortious liability as incorporated by reference to the Warsaw Convention in the transportation contract at bar between decedent and respondent;

7. If the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not, per se,* render void and unenforceable the limitation of respondent's tortious liability as incorporated in the transportation contract at bar by reference to the Warsaw Convention—then in refusing to hold that such contractual limitation of such tortious liability of respondent does not validly operate to limit the damages recoverable by petitioners to the

amount awarded in the judgment, upon the undisputed facts (R. 48-49) demonstrating that respondent failed to offer decedent a choice between a lower fare and a maximum fare and a corresponding election between the lower tortious liability and maximum tortious liability, or any special contract for higher tortious liability (see pp. 22-23, 38, *infra*);

8. In refusing to hold that the provisions of Subdivision (1) of Article 22 of such Warsaw Convention and its allied Articles 17 and 20, and as incorporated in such transportation contract, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby, and upon such grounds void and unenforceable to limit respondent's tortious liability to petitioners for damages for the wrongful death of decedent;

9. In denying petitioners' motion to strike out as insufficient in law the alleged third and fourth partial affirmative defenses of respondent, upon the particular federal grounds specified herein by petitioners;

10. In granting respondent's motion for judgment on the pleadings or, in the alternative, for summary judgment for the dismissal of petitioners' claim for damages substantially in excess of the sum of $8,291.87, as prescribed in Subdivision (1) of Article 22 of the Warsaw Convention.

Reasons for Granting the Writ.

1. The Special Term and the Appellate Division of the New York Supreme Court have decided federal questions of substance (*vide*, pp. 5-8, *supra*) not previously determined by this Court. Indeed, up to this moment, no other Court, State or Federal, has at any time ever considered and determined such particular federal questions. The novelty of the federal questions as raised

by petitioners was conceded by respondent's counsel in open court at Special Term and in the Appellate Division (R. 31-32, 136; *vide* pp. 5-8, 12, *supra*). Their substantial character cannot be gainsaid because, to say the very least, they are obviously debatable, requiring "analysis and exposition for ... decision". (*Millheim* v. *Moffat, etc.*, 262 U. S. 710, 716-717; *Senn* v. *Tile, etc.*, 301 U. S. 468, 476-477; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 91; *Chesebrough* v. *Los Angeles, etc.*, 306 U. S. 459, 463; Ohlinger's Federal Practice, Vol. I [Rev. Ed. 1949], p. 508 [28:1257 (4)].)

The particular constitutional and other federal questions presented in the *Garcia* case are indisputably different from those in the case at bar. The legal distinctions between the two cases as well as those between the case at bar and the three other Warsaw Convention cases* cited by respondent, are clearly demonstrated in petitioners' accompanying brief (pp. 56-59, *infra*).

Respondent's argument, as repeatedly urged in the Courts below (R. 17, 31-32, 118, 136, 148) that the *Garcia* case is the governing law of the case at bar, is specious and the Appellate Division's affirmance of the Special Term's decision as expressly based (R. 70) on the *Garcia* case, is indubitably fallacious.

2. The Special Term and the Appellate Division of the New York Supreme Court have decided federal questions of substance not in conformity with principles of constitutional law under the Seventh Amendment, as pronounced by this Court and various other authorities.

Petitioners contend that Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019) and the decisions and judgments of the Special

---

**Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, affd. without opinion in 267 App. Div. 947 (First Dept.), affd. without opinion in 293 N. Y. 878, cert. den. 324 U. S. 882; *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88; and *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 Fed. Supp. 338.

Term and the Appellate Division applying such segment of the Warsaw Convention to the undisputed facts herein, arbitrarily deprive petitioners of their rights and personal property in their claim to recover damages in full from respondent for the wrongful death of decedent. Such deprivation of petitioners' rights and personal property is in clear contravention of the Seventh Amendment of the United States Constitution, which guarantees petitioners' rights of trial by jury as to the issue of their damages *in excess* of the sum of $8,291.87, the amount awarded to them as prescribed in the foregoing provision of the Warsaw Convention.

Petitioners further contend that in the light of the clear legal principles enunciated by this Court and the applicable decisions of other Federal Appellate Courts, the action at bar is definitely a "Suit at Common Law" within the meaning of the Seventh Amendment. Respondent's contention to the contrary is untenable.

Petitioners also urge that the State Courts definitely possess judicial power to determine whether Subdivision (1) of Article 22 of the Warsaw Convention, as one of the products of Federal action—the action of the United States Senate and the President in adhering to the Warsaw Convention—infringes the Seventh Amendment of our Federal Constitution. This proposition, too, is not open to question under the prevailing legal principles in cases adjudicated by this Court and other authorities.

It is the contention of petitioners, upon authoritative pronouncements of this Court, that the unconstitutionality and invalidity of Subdivision (1) of Article 22 of the Warsaw Convention, which is part and parcel of the transportation contract at bar (R. 62-68), fatally infects such contract at its core and renders it unenforceable to the same extent and hence no rights inconsistent with those preserved in the Seventh Amendment can be predicated upon it.

But even if the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not, per se,* vitiate the purported limitation of respondent's tortious

liability as expressly incorporated in the transportation contract at bar (R. 62-68) in reference to the Warsaw Convention, petitioners further contend that such transportation contract is itself unenforceable to limit respondent's tortious liability. This is so because of respondent's conceded (R. 48-49) failure to offer decedent a choice between a lower fare and a maximum fare and a corresponding election between the lower tortious liability and the maximum tortious liability or any special contract for higher liability.

Clearly, as a matter of law, decedent did not waive for himself or petitioners the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability in excess of the Warsaw Convention limits. Respondent's position in this respect is contrary to all law and authority.

3. The Special Term and the Appellate Division of the New York Supreme Court have also determined a Federal question of substance not in accordance with the established cardinal canons of construction and other legal principles, as enunciated by this Court and other authorities which govern the true legal effect of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20, and the transportation contract (R. 62-68) as expressly incorporating such Articles of the Warsaw Convention.

Petitioners contend that the provisions of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20 and as expressly incorporated by reference to the Warsaw Convention in the transportation contract (R. 62-68) thereunder, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent, and as to the persons affected thereby, and hence are not operative to limit respondent's tortious liability herein. In this connection, it is a significant indisputable circumstance that neither in the limitation of liability clauses of the Warsaw Convention (49 U. S. Stats., Part II, pp. 3000, 3018-20), nor in the

transportation contract (R. 62-68), itself, will the term "negligence" be found. Moreover, the very pivotal provisos of Article 22 are fatally infected with ambiguity and uncertainty as to the *persons* affected by the purported limitations of the carrier's liability. Article 22 reads as follows:

> "(1) In the transportation of passengers *the liability of the carrier for each passenger* shall be limited to the sum of 125,000 francs * * *."

But *to what liability* does this limitation apply, the liability of the carrier to or for the benefit of *each passenger in his lifetime*? Or the carrier's liability to or for the benefit of the surviving *widow and next of kin* of a deceased passenger?

Under the established legal principles and authorities, every proviso purportedly limiting the tortious liability of a common carrier, whether it be in a contract, *a statute, a treaty or a convention,* must be crystal clear, specific and certain in its operation. Nothing must be left to implication. (*Vide* authorities at pp. 41-43, 46-55, *infra,* of petitioners' accompanying brief.) By this standard of interpretation, the limitation of liability, as asserted by respondent herein, is not enforceable. This conclusion is strongly impelled by historical and strong moral considerations and grave principles of public policy and justice concerned with maintaining maximum safety of passengers and security for their dependents. Ever since the late eighteenth century, which marked the advent of the doctrine of restriction of a common carrier's liability in common law jurisprudence, the British and American courts have frequently, in the interests of justice, morality and public policy, invoked the principle of *strictissimi juris* in refusing to enforce it in situations like that at bar.

4. The federal questions herein are of general sociological importance and public interest, affecting as they do the substantial rights and ultimately the general wel-

fare and security of innumerable citizens, inhabitants, and families throughout the United States, including the substantial rights of petitioners as surviving widow and next of kin of decedent, Arthur Albertus Lee.

Most, if not all of such passengers, including decedent, were persons of unusual talents, accomplishments and substantial earnings. Obviously, when such persons lose their lives in airplane accidents caused by *negligence* of air carriers, the families—widows and children—cannot be deemed justly and fully compensated for their loss and adequately protected by the mere sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, which represents the maximum limit of the air carrier's liability as purportedly fixed in the Warsaw Convention. Since the occurrence of the tragic "Yankee Clipper" disaster, there have been several similar airplane accidents in various places on the international horizon, with attendant loss of life. Conceivably, others may occur from time to time in the future.

As early as 1930, the following observation on the liability limitation clause of the Warsaw Convention was made in 1 Journal Air Law 376:

> "* * * Responsibility is limited to 125,000 francs. * * * The author believes the limitation for passenger liability is too low in consideration of the class of persons using this method of transportation."

If, unquestionably, the limitation of the carrier's tortious liability was drastically inadequate in 1930, it is certainly extremely more so in terms of the approximately fifty per cent devaluated dollar of today!

The extreme danger to the general public inherent in so arbitrarily inequitable a provision in the Warsaw Convention for the restriction of the tortious liability of air carriers, is that, as recognized in various cases adjudicated by this Court, it will *tend to lessen considerably* the high degree of care always to be exercised by such air

carriers for the protection of passengers and their dependent families.

5. Furthermore, unless the concededly new and important serious federal questions raised by petitioners herein should be finally considered and correctly answered by this Court, they are likely to recur frequently in other similar cases in the future, with attendant substantial expense to the various suitors involved. A correct adjudication of such questions on the merits will have the salutary effect of definitely apprising the general air-travelling public of their rights under the Warsaw Convention and serving as a clear guide to courts and members of the bar throughout the land.

In their accompanying brief, petitioners present a legal analysis of the federal questions herein and demonstrate the correctness of their contentions with supporting authorities. This Court is respectfully referred thereto.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the Supreme Court of the State of New York in the County of Westchester, toward the end that the decisions of the State Courts herein may be reviewed and reversed in conformity with the Constitution and the laws of the United States.

Dated: New York, N. Y., the 10th day of February, 1950.

MARY ELIZABETH LEE,
MARY ELIZABETH (BETTY) LEE
and WILLIAM CLAIR LEE

By .....,
HAROLD J. SHERMAN,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Brief on Behalf of Petitioners for a Writ of Certiorari.

Opinions Below.

No opinions were rendered by any of the courts below. The two decisions (R. 42, 70) of Mr. Justice J. Gordon Flannery at Special Term of the New York Supreme Court, County of Westchester, are not officially reported. The decisions (R. 81-82, 121-122) of the Appellate Division of the New York Supreme Court in the Second Judicial Department, are officially reported in 275 App. Div. 855 (Case No. 1) and 962 (Case No. 2). The decision (R. 152) of the New York Court of Appeals is officially reported in 300 N. Y. (Dec. 31, 1949, Wkly Adv. Shts.) p. i, foll. p. 545).

Jurisdiction.

The jurisdiction of this Court is invoked under Article 3, Section 2 of the United States Constitution and Section 1257 of Title 28 of the United States Code.

Statement.

The undisputed facts of petitioners' cause of action against respondent and the history of the prior proceedings herein are outlined in petitioners' accompanying petition. It is, therefore, unnecessary to restate them here. However, reference to the dominant factual features of this case as contained in the record will be made in connection with the argument herein presented.

Specification of Errors.

The errors which petitioners desire this Court to review upon the granting of a writ of certiorari herein are set forth at pages 18-20 in the petition, which are herein incorporated by reference.

Argument and Authorities.

POINT I.

Subdivision (1) of Article 22 of the Warsaw Convention alleged in the third and fourth partial defenses, is void and unenforceable to limit respondent's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves petitioners' absolute right of trial by jury as to all issues of fact herein, including the issue of damages.

The pertinent provisos of Subdivision (1), Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, pp. 3000, 3019) upon which respondent's alleged third and fourth partial defenses (R. 67-68) are predicated, are:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the

said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

[N.B. For all that appears from the Congressional Record (78 Congress Rec., Pt. 11, pp. 11561, 11577-11582 (73rd Cong., 2nd Sess.) the Warsaw Convention along with 11 other treaties, was proposed merely in a *pro forma* manner by the late Senator Pittman of Nevada on June 15, 1934, for consideration by the Senate. The record of the proceedings of the Senate on that day is barren of any discussions whatever on the merits or the validity of any part of such convention under the Seventh Amendment or any other feature of the United States Constitution, or any of the General Laws of the United States. The formal resolution of the Senate for "adherence" by the United States to the Warsaw Convention immediately followed its reading.]

However, one of the most important rights enjoyed by all individuals living under our Constitutional form of Government is that of trial by jury in all suits at common law, involving claims of a value exceeding $20.00. This right was possessed by decedent, Arthur Albertus Lee, up to the time of his decease. It is vested in each of petitioners independently. So sacred is this right that it has been preserved against infringement by any branch or member of our Federal Government, including both houses of Congress and the President, in the Seventh Amendment of our United States Constitution.

The pertinent provisos of such Seventh Amendment are as follows (U. S. C. A. Const. Amends., p. 379):

"AMENDMENT VII—CIVIL TRIALS.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *."

This Amendment of our United States Constitution, as is true of all the first ten amendments thereof, operates

as a restriction of the powers of all branches or members of our Federal Government, including both houses of Congress and the President.

As stated in regard to the first ten amendments in *Fox* v. *Ohio,* 5 How. (46 U. S.) 410, 434, by this Court (p. 434):

> "• • • They are exclusively restrictions upon the Federal power, intended to prevent interference with *the rights* of the States and *of their citizens.*" (Emphasis supplied.)

Accord: *Lloyd* v. *Dollison,* 194 U. S. 445, 447; *Smith* v. *American National Bank,* 89 Fed. 832, 838 (C. C. A. 8th); *Livingston* v. *Mayor of New York,* 8 Wend. (N. Y.) 85, 101.

The Seventh Amendment not only controls and limits the general legislative powers of Congress and the President, but is paramount even to their treaty-making powers, (Art. 2, §2, Cl. 2, U. S. Const. U. S. C. A., p. 326) and to the extent of preserving as inviolate the right of trial by jury, operates as an insuperable curb upon them. There is nothing about a treaty or convention that is so sacrosanct, *per se,* as to immunize it against the fundamental prohibitions of our United States Constitution. Story's Commentaries on the Constitution, (5th Ed. 1905) §1508; 4 Ham. Works 342; *The Cherokee Tobacco* Case, 11 Wall (78 U. S.) 616, 620-621; The License Cases—*Thurlow* v. *Moss*—5 How. (U. S.) 505, 613; Moore's International Law Digest (1906 Ed.) Vol. V, pp. 178-179, §738, quoting Bayard, Secretary of State, to Miller; *Geofrey* v. *Riggs,* 133 U. S. 258, 267; *Thomas* v. *Gay,* 169 U. S. 264, 271; *Asakura* v. *Seattle,* 265 U. S. 332, 341; and *Bell* v. *Hood et al.,* 71 Fed. Supp. 813, 816 (U. S. D. C., S. D. Calif., Mathes, *D. J.,* 1947.)

Indeed, for all legal purposes, including tests of constitutionality, a treaty or convention is of no higher dignity than an ordinary Federal Statute or Congressional Law. (*Ex Parte Larrucea et al.,* 249 Fed. 981, 983; *Val-*

entine, etc. v. *U. S.*, 299 U. S. 5, 10; *U. S.* v. *18 Packages, etc.*, 230 Fed. 564, 569 (C. C. A. 3rd) appeal dismissed in 242 U. S. 617; Moore's International Law Digest (1906 Ed.), Vol. V, pp. 178-179, §738, quoting Bayard Secretary of State, to Miller; The License Cases,—*Thurlow* v. *Moss*—5 How. (U. S.) 505, 613.

The United States Senate and the President could not, under the guise of exercising their treaty-making powers, impose an arbitrary monetary value on the lives of Americans or limit the liability of air carriers for their acts *ex delicto* in contravention of the Seventh Amendment. In presuming to do so, they have, in effect, deprived petitioners of their respective absolute rights to a jury trial as to an important issue of fact herein concerning their substantial damages in excess of the amount prescribed in Article 22 of the Warsaw Convention. As it happens, in the case at bar, by reason of the general economic and social position (R. 25, 58) of decedent, Arthur Albertus Lee, petitioners concededly (R. 21) sustained damages in a monetary amount considerably in excess of that awarded in the judgment herein. If they can muster proof of every dollar of their damages, it is their constitutional right to present, without any restriction whatsoever, such proof to a court and jury for consideration. Upon time-honored principles of law and justice they cannot be shorn of this sacred and traditional American right, directly or indirectly, even as an incident of any exercise of the Federal Government's treaty-making power for the regulation of international navigation in the air. So substantial is the right of jury trial *that it cannot be sacrificed in the general economic or other interests of our Federal Government or any special group of adventurers in the business of common carriers of passengers by aircraft.*

31 Am. Jur. 556-557, §7; 1 Annals of Congress 424, 435; 16 R. C. L. 197, §15; *U. S.* v. *130 Barrels of Whiskey*, 27 Fed. Cases (Case No. 15,938) 281-282; *Parsons* v. *Bedford et ano*, 3 Pet. (28 U. S.) 433, 445, 447-448, opin. by the eminent Mr. Justice Story; *Ex Parte Peterson*, 253

U. S. 300, 310; Cf. *State, etc.* v. *Kohler,* 200 Wis. 518, 561, 69 A. L. R. 348, 371 (1930).

In *Ratheon Mfg. Co.* v. *R. C. A. of America,* 76 Fed. (2d) 943, 947 (C. C. A. 1st, 1935) affd. in 296 U. S. 459, the United States Circuit Court of Appeals said regarding the right to jury trial as guaranteed by the Seventh Amendment (p. 947):

> "Neither the Congress nor the courts can deprive a litigant of this right."

Accord: 3 Writings of Thomas Jefferson, (Washington Ed.) 71; 16 R. C. L. 193, §13; 31 Am. Jur. 552, §3; *Baylis* v. *Travelers Insurance Co.,* 113 U. S. 316, 321; *Diederich et al* v. *American News Co.,* 128 Fed. (2d) 144, 146 (C. C. A. 10th, 1942) an action for damages for wrongful death; *Bothwell, etc.* v. *B. E. R. Co.,* 215 Mass. 467, 476; *Patrie* v. *Murray et ano.,* 43 Barb. 323, 336, 29 How. Pr. 312, affd. by General Term of the New York Supreme Court in 43 Barb. 337; *Capitol Traction Co.* v. *Hoff,* 174 U. S. 1, 7; Cf. *Patton et al.* v. *U. S.,* 281 U. S. 276, 290 (1930).

Trial by jury in the totality of its legal conception, as understood by courts from time immemorial, embraces all issues of fact in all actions at law, including issues as to the *quantum damnum.* And under the Seventh Amendment of our Federal Constitution, petitioners' rights to have a jury assess their damages in full *secundum allegata et probata,* are absolute and inviolable.

16 R. C. L. 215, §32; id. 193, §13; 17 C. J. 1057, §361; *Dimick* v. *Schiedt,* 293 U. S. 474, 476-488; *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co., Inc.,* 141 Fed. (2d) 41, 44-45 (C. C. A. 3rd, 1944); *Bothwell, etc.* v. *B.E.R. Co.,* 215 Mass. 467, 476 (1913); *Kretschmar, etc.* v. *City of New York,* 225 A. D. 761 (Case No. 4, Second Dept. 1928); *Wilkinson, etc.* v. *Boehm et al.,* 231 A. D. 295, 296 (3rd Dept., 1931).

As pronounced in *Diederich et al* v. *American News Co.,* 128 Fed. (2d) 144, 146 (C. C. A. 10th, 1942), which

cites the cases of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 657, and *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 486-487:

> "The right guaranteed by the Federal Constitution is *one of substance*, not mere form or procedure. But it is a *substantive* right which flows from the Federal Constitution which is the supreme law of the land, * * *." (Emphasis supplied.)

See also: 16 Am. Jur. 233, §348; id. 234, §352; *Birkett as Admr., etc.* v. *Knickerbocker Ice Co.*, 110 N. Y. 504, 508; *Wilkinson as Admx. etc.* v. *Boehm et al.*, 231 A. D. 295, 296 (3rd Dept., 1931).

The Action at Bar Is a "Suit at Common Law" Within the Meaning of the Seventh Amendment.

The expression "suits at common law", as used in the Seventh Amendment, is tantamount in meaning to "suits at law" or "suits peculiarly *legal in nature* and such as it was proper to assert in *courts of law* and by the *appropriate modes and proceedings of courts of law*", as distinguished from courts of equity and admiralty. It is not restricted merely to cases known to the domestic common law at the time of the adoption of our Federal Constitution. Embraced in it are all the progressively variant forms of legal rights and remedies, statutory and otherwise, which according to the course of our common law court trial procedure, are triable by a court and jury, as contrasted with purely equitable rights and remedies administered exclusively in courts of equity, or those rights and remedies which are within the exclusive jurisdiction of courts of admiralty.

31 Am. Jur. 557, §8; 16 R. C. L. 195, §14; *Parsons* v. *Bedford*, 3 Pet. (28 U. S.) 433, 446, opin. by the eminent Mr. Justice Story; *Shields* v. *Thomas et al.*, 18 How. (59 U. S.) 253, 262; *Baines* v. *The James & Catherine*, 2 Fed. Cases (Case No. 756) 410, 416; *Whitehead* v. *Shattuck*, 138 U. S. 146, 151; *Belleavance* v. *Plastic-Craft Novelty*

Co. et al., 30 Fed. Supp. 37, 38 (U. S. D. C. D. Mass. 1939), where the constitutional right of trial by jury was upheld in statutory action at law for damages for violation of a patent right; *Fleitman* v. *Welsbach Co.*, 240 U. S. 27, 29, where actions to recover damages under the Sherman Anti-Trust Statutes (26 Stat. 209; 15 U. S. C. A. §1 *et seq.*) were held triable by court and jury.

The courts have in principle upheld the constitutional *substantive right* of trial by jury *specifically under the Seventh Amendment* in statutory actions for the recovery of damages for wrongful death.

Robostelli v. *N. Y. N. H. & H. R. Co.*, 33 Fed. 796, 801 (U. S. C. C. S. D. N. Y.) and *Diederich et al* v. *American News Co.*, 128 Fed. (2d) 144, 145-146 (C. C. A. 10th, 1942) where the courts upheld the constitutional right of trial by jury in *statutory actions for the recovery of damages for wrongful death.*

But not only is the action at bar in the general category of "suits at law" within the purview of the Seventh Amendment. It is by its peculiar factual and legal features and nature a "common law" action. This is so because it is founded directly on Common Law Principles of Private International Jurisprudence or Conflicts of Law prevailing at the *lex fori*—namely, New York (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 106-113; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. While, to be sure, the foreign law of Portugal (R. 21-22, 52-56) gave rise to petitioners' rights to damages for the wrongful death of decedent, such foreign law is but an *incidental fact in the transaction.* It is not enforced as such at such *lex fori.* On the contrary, it is only the *rights* of petitioners which are enforced there, and this is done by means of a remedy springing directly from the local common law at such *lex fori.*

Beale's "Conflict of Laws", Volume One (1935 Ed.) pp. 52-53; *Gray* v. *Gray*, 87 N. H. 82, 83, 87, 174 Atl. 508 (1934); American Law Institute's Restatement, Conflict of Laws (1934 Ed.) §5, p. 9; 12 C. J. 432, §2; 2 Kent's Commentaries (11th Ed.) 454; 11 Am. Jur. 296, §3.

For definition of "common law" as embracing law of nations or international law, see Wharton's Law Lexicon (14th Ed., 1938) p. 222, right column.

Indeed, the general "common law" basis and character of the action at bar were recognized antecedents of, and known to exist as such at the time of, the adoption of our Federal Constitution and the first ten amendments therein.

11 Am. Jur. 296, §3; 1 Kent's Commentaries (11th Ed.) 1, 342-343, 473-474; 2 Kent's Commentaries (11th Ed.) 454; Holdsworthy's History of English law, Volume 5 (1924 Ed.), p. 26.

The Constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention Under the Seventh Amendment Can Be Tested Legally in the Instant State Court Action at Law for Damages for the Wrongful Death of Decedent.

This proposition is sustained by the decisions in *Patrie* v. *Murray, et ano.*, 43 Barb. (N. Y.) 323, 324-337, 29 How. Pr. (N. Y.) 312, 313-326, affd. by General Term of the New York Supreme Court in 43 Barb. 337 and in *Weatherbee* v. *Johnson, et ano.*, 14 Mass. 412, 415-421, which is in all respects substantially identical with the *Patrie* case. Both of such authorities are cited with approval by this Court in *Capitol Traction Co.* v. *Hoff*, 174 U. S. 1, 11-13. In the *Patrie* and *Weatherbee* cases, the state courts affirmatively held that the constitutionality of *Federal Legislation* under the Seventh Amendment could be legally determined in the state courts. Such particular state courts even went so far as to declare the Federal Legislation before them as being partially unconstitutional under the Seventh Amendment.

As previously pointed out, a convention or treaty is of no higher dignity than an ordinary Federal statute or Congressional law (see authorities at pages 30-31, *supra*). And as is true of an ordinary Federal Statute or Congressional law, a convention or treaty, as the product of *federal action*, is subject to the prohibitions and limitations

of the first ten amendments of our Federal Constitution (see authorities at pages 29-30, *supra*). This well-established proposition is not to be confounded with the rule that the Seventh Amendment in no way restricts state legislative or judicial acts *solely with reference to and in conformity with state laws.* State courts have always been free to decide questions of unconstitutionality concerning *federal laws,* including treaties or conventions, under any of the first ten amendments of the United States Constitution. It is strictly in accordance with that very principle that petitioners herein invoke the Seventh Amendment as a means of testing the constitutionality of Federal Government action—*i.e.,* the action of the United States Senate and the President in "adhering" to the Warsaw Convention and thereby (*i.e.,* through the operation of Subdivision (1) of Article 22) arbitrarily depriving petitioners of their absolute rights to a jury trial as to all their damages in excess of twenty dollars.

By force of the foregoing principles of constitutional law and the authorities supporting them, Subdivision (1) of Article 22 of the Warsaw Convention, in arbitrarily depriving petitioners of their rights of trial by jury as to their damages in excess of the amount prescribed therein, contravenes the Seventh Amendment and is therefore void and unenforceable to limit respondent's tortious liability for damages. It is beyond question that petitioners' rights of action for the recovery of their damages in full are in law recognized to be entirely independent of those of decedent in his lifetime or of his estate and constitute rights of personal property. (*Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 348-351; *Clark et al* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th); *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 104; 1 Sutherland's Law of Damages, (4th Ed.) 21, Section 6.) As such, they should be enforced under the aegis of the Seventh Amendment.

POINT II.

The transportation contract made between decedent, Arthur Albertus Lee, and respondent, pursuant to such Warsaw Convention, as alleged in such fourth partial affirmative defense, being infected at its core with the unconstitutionality of Subdivision (1) of Article 22 of such Warsaw Convention, is likewise void and unenforceable to limit respondent's tortious liability for damages.

The Warsaw Convention must, of course, be read and construed as an inherent part of the contract (R. 62-68) of transportation which expressly incorporates its provisos. (*Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N. Y. 246-251; *The Halley* [1867-1869], 2 *The Law Reports, Privy Council Appeal Cases* [Eng.] 193, 203.) And the validity of such contract (R. 62-68) in respect to the purported limitations of respondent's tortious liability, even aside from any question of construction, is directly dependent upon the constitutionality and validity *per se* of Subdivision (1) of Article 22 of such Warsaw Convention. It, therefore, follows that the aforementioned defect of such Warsaw Convention—*i. e.*, the unconstitutionality and invalidity of Subdivision (1) of Article 22 thereof, fatally infects such contract (R. 62-68) at its core and renders it unenforceable to the same extent.

As enunciated by this Court in *Norton* v. *Shelby County*, 118 U. S. 425, 442:

> "* * * An unconstitutional act is not a law. *It confers no rights;* it imposes no duties; *it affords no protection;* * * * It is, in legal contemplation as inoperative as though it had never been passed." (Emphasis supplied.)

And as promulgated by the New York Court of Appeals in *Chenango Bridge Co.* v. *Paige et al.*, 83 N. Y. 178, 191:

> "'When a statute is judged to be unconstitutional, it is as if it had never been. Rights cannot be built

> up under it; *contracts which depend upon it for their consideration are void;* it constitutes a protection to no one who has acted under it * * *. And what is true of an act void *in toto* is true also as to *any part* of an act which is found to be unconstitutional and which consequently is to be regarded as never having at any time been possessed of any legal force'." (Emphasis supplied.)

Accord: Cooley on Constitutional Limitations, Vol. 1 (8th Ed.) pp. 382-384; 12 Corpus Juris 801, §230; Clark's New York Law of Contracts, Vol. 1 (1922 Ed.) p. 626, §401; *Chicago, Indiana L. Railway Co.* v. *Hackett,* 228 U. S. 559, 566; *Ex Parte Siebold,* 100 U. S. 371, 376.

Patently, these principles apply also in respect to an unconstitutional convention or treaty. For a convention or treaty is of no higher dignity than an ordinary Federal statute or Congressional law (see authorities at pp. 30-31, *supra*).

But even if the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not per se* vitiate the purported limitation of respondent's tortious liability as incorporated in the transportation contract at bar (R. 62-68) by reference to the Warsaw Convention, such transportation contract is itself unenforceable to limit respondent's tortious liability. This is so because of respondent's conceded (R. 48-49) failure to offer decedent a choice between a lower fare and the maximum fare and a corresponding election between the lower tortious liability and the maximum tortious liability or any special contract for higher liability.

Union Pac. R.R. Co. v. *Burke,* 255 U. S. 317, 321-323; *Curtiss-Wright Flying Service Co.* v. *Glose,* 66 Fed. (2d) 710, 711-713 (C. C. A. 3rd, 1933), cert. den. in 290 U. S. 696; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248 (1935).

POINT III.

Petitioners' decedent did not waive for himself or petitioners the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability in excess of the Warsaw Convention limits.

Respondent's contention that petitioners' decedent waived the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability without limitation, is, as a matter of solidly established law, wholly untenable.

Admittedly (R. 48-49), respondent did not accord to petitioners' decedent a *choice* between a lower and a higher fare and between a correspondingly reduced and maximum liability or any *real* consideration for limited liability. (*N. Y. C. Railroad Co.* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 379-380; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248 and various other authorities cited at p. 38, *supra.*) When he purchased his transportation ticket from respondent for the usual maximum charge, he did so under "duress of circumstances". [*N. Y. C. Railroad* v. *Lockwood,* 17 Wall (84 U. S.) 357, 382; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248.]

A waiver of any right cannot arise *in invitum.* It must be an act stemming from an individual's volition. The individual must be *free* to exercise his discretion in making an election—*a choice*—as between the value of one right and benefit and that of another, with full knowledge of both.

Panther Rubber Manufacturing Co. v. *Commissioners,* 45 Fed. (2d) 314, 316 (C. C. A. 1st); 67 C. J. 298; *Hodges* v. *Easton,* 106 U. S. 408, 412; *U. S.* v. *Rathbone,* 27 Fed. Cases (Case No. 16121) 711, 712; *Wheelock* v. *Lee,* 74 N. Y. 495, 501; *Hasey* v. *McMullen et al.,* 109 Minn. 332, 337; 16 R. C. L. 217, §34; 35 C. J. 202, §11, (left column); 35 C. J. 147, §12 (right column).

Besides, so sacred and so carefully guarded is one's Constitutional right of trial by jury, that the Courts indulge every presumption in its favor and against any claim of waiver. A party asserting a waiver of this most important right by another must allege and establish it clearly and convincingly. The Courts will never infer it by implication.

Hodges v. *Easton,* 106 U. S. 408, 412; *U. S.* v. *Rathbone,* 27 Fed. Cases (Case No. 16121) 711, 712; *Wheelock* v. *Lee,* 74 N. Y. 495, 501; *Hasey* v. *McMullen et al.,* 109 Minn. 332, 337; 16 R. C. L. §217, 34; 35 C. J. 202, §11 (left column); 35 C. J. 147, §12 (right column).

Moreover, decedent was in no position to conclude by any act of his, petitioners' own personal rights under the Seventh Amendment to enforce their new and independent rights to recover damages in full for his wrongful death. (*Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 348-351; *Clark et al.* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th); 1 Sutherland's Law of Damages (4th Ed.) 21, §6, *Hamilton* v. *Erie R.R. Co.,* 219 N. Y. 343, 350-351, 353; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 104, opinion by Cardozo, *J.*). Hence, petitioners cannot in law be regarded as having waived them.

POINT IV.

The provisions of Subdivision (1) of Article 22 of such Warsaw Convention and its allied Articles 17 and 20, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby. Subdivision (1) of Article 22 and the Transportation Contract Relating Thereto are, therefore, void and unenforceable to limit respondent's TORTIOUS liability for damages.

In view of respondent's conceded (R. 48-49) failure to charge decedent, Arthur Albertus Lee, a reduced fare, or to offer him a *real* opportunity to choose as between a lower and a higher fare, and a correspondingly lower

and a higher liability, Subdivision (1) of Article 22 of such Warsaw Convention, and the transportation contract (R. 62-68) at bar, must, as to petitioners, be regarded as purportedly imposing a naked arbitrary exemption from *tortious* liability on respondent's part. (*Union Pacific R.R. Co.* v. *Burke*, 255 U. S. 317, 321-323; *Conklin* v. *Canadian-Colonial Airways, Inc.*, 266 N. Y. 244, 246-249 (1935); and various other authorities cited on pp. 38-39, *supra.*) Admittedly, petitioners' (R. 21) losses are considerably in excess of the sum of $8,291.87 as awarded in the judgment herein in consequence of respondent's responsibility for decedent's death, particularly because of his general economic and social position (R. 25, 58) during life. If respondent could not be held liable to petitioners for anything in excess of the inadequate sum of $8,291.87 — — — in terms of today's monetary values only about $4,000.00 — — — respondent would not merely enjoy self-imposed limitation of *tortious* liability, *but rather, in a substantial sense, complete immunuity from liability!*

But before arrogating to itself so harsh and unjust an advantage, respondent should be in a position to demonstrate, convincingly and satisfactorily, that the limitation provisos in the Warsaw Convention are *clearly specific and certain in every respect,* as strictly required by law and principles of justice. (See Cardinal Canons of Construction and authorities in relation thereto in Appendix A, *infra*). Indeed, the burden strictly rests on respondent to sustain the alleged validity of such drastic limitation provisos beyond the penumbra of any doubt. (*Schnell* v. *Vallescura,* 293 U. S. 296, 303-304; Moore on Carriers, Vol. I (2nd ed. 1914) §22, pp. 472-473, 517-519; *Atwood* v. *The Reliance Transportation Co.,* 9 Watts (Pa.) 87, 88; *Perkins, etc.* v. *The N. Y. C. R. R. Co.,* 24 N. Y. 196, 206; *Compania de Navigacion La Flesha* v. *Brauer,* 168 U. S. 104, 119-120.)

Under the established legal principles and authorities, every proviso purportedly limiting the *tortious* liability of a common carrier, whether it be in a *contract,* a *statute,* a *treaty,* or a *convention, must be crystal clear, specific,*

and certain in its operation. Nothing must be left to implication.

10 C. J. 181; *Compania de Navigacion la Flecha* v. *Brauer,* 168 U. S. 104, 123-124; *Kenny* v. *N. Y. C. & H. R.R. Co,* 125 N. Y. 422, 425-426; *Nicholas et al* v. *N. Y. C. & H. R.R. Co.,* 89 N. Y. 370, 374, 375; see also Cardinal Canons of Construction and various other authorities cited thereunder in Appendix "A", *infra.*

The case of *Wheeler* v. *O. S. N. Co.,* 125 N. Y. 155, 160-161, pointedly demonstrates that *even a federal statute* must yield to the paramount rule of law that a common carrier cannot by mere general and broad language restrict his liability for negligence. There an enactment of Congress (§4281 of the Revised Statutes), purportedly exonerated, in general terms, a common carrier by water from liability for particular goods under certain circumstances. There the New York Court of Appeals ruled that such statute must be strictly construed so as to exclude only such common carriers' liability as an insurer for "losses by accident or mistake" (p. 160), without affecting in any way such common carriers' liability for *negligence* because such statute "does not by *clear and definite language indicate its purpose to go further*" (p. 161). (Emphasis supplied.)

To same effect: *La Bourgogne,* 144 Fed. 781, 786-787 (C. C. A. 2d, 1906), affd. in 210 U. S. 95 (1907).

If even a federal statute is controlled by the prevailing rule of law relied on by petitioners, so, too, is a treaty or convention of the United States with any foreign country. For a treaty or convention is of no higher dignity than an ordinary Federal statute or Congressional law. (See authorities at pp. 30-31, *supra.*) Moreover, a treaty or convention must, like all contracts and statutes, be construed in the light of established principles of construction. (*Tucker* v. *Alexanderoff,* 183 U. S. 424, 437; *Hamilton* v. *Erie R.R. Co.,* 219 N. Y. 343, 353; *Re Zalewsky,* 292 N. Y. 332, 336-337; *Wright* v. *Henkel,* 190 U. S. 40, 57.)

As the New York Court of Appeals has stated (*Kenny* v. *N.Y.C. & H. R. R. Co.*, 125 N. Y. 422, 425-426) mere "general words and language *capable of other operation,* will not be construed to limit the responsibility of the carrier for *negligence.*" (Emphasis supplied.)

And as this Court has said (*Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 119-120):

> "'*The language is general and broad and might very well comprehend every description of risks* incident to the shipment. But we think it would be going farther than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence or *want of ordinary care,* either in the seaworthiness of the vessel, her proper equipments and furniture, or *in the management by the master and hands'.*" (Emphasis supplied.)

As appears from the very face of the broad and general language of Articles 17, 20, and 22 of the Warsaw Convention, it "comprehends every description of risks incident to" the transportation of passengers, thereby going further than what the law of proper legal construction permits.

Article 17 of the Warsaw Convention (49 U. S. Stats. at Large, Pt. II, 3013, 3018) which is part and parcel of the transportation contract (R. 62-68) at bar provides:

> "The carrier *shall be liable for damage sustained* in the event of *the death* or *wounding of a passenger* or *any other bodily injury* suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*" (Emphasis supplied.)

In passing for a moment, it may be noted that Article 17, in the same breath, so to speak, generally and broadly

refers to the carrier's liability for "death or * * * bodily injury suffered by a passenger".

Now, the pertinent provisos of Article 20 of the Warsaw Convention are:

> "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Again, it should be noted that the reference in Article 20 to "damage" is rather broad and general.

And it is in connection with Articles 17 and 20 that Subdivision (1) of Article 22 states so far as is germane to the issue:

> "(1) In the transportation of passengers *the liability* of the carrier *for each passenger* shall be limited to the sum of 125,000 francs. * * * " (Emphasis supplied.)

Now, after reading the foregoing Articles, separately or together, where is there to be found any clear or specific mention of the particular type or category of liability which the average passenger could fairly be deemed to understand as being embraced within the limitation provisos of Article 22?

Obviously, Article 17 speaks of a general liability for "damage". To be sure, in connection with this, there is a clause in it:

> " * * * if the accident which caused the damage so sustained took place on board the aircraft * * *."

But, what specific type or category of accident is referred to by these words? An accident caused by *whom?* An accident caused by acts of fellow passengers, or strangers, or by acts of the carrier's agents and employees? It is universally recognized as established by law, that every

common carrier is held strictly responsible for the exercise of a high degree of care to prevent accidents and injuries to passengers *from acts of even fellow passengers or strangers, irrespective of whether such acts be those of negligence or wilfulness.* 10 Am. Jur. 256-259; 13 C. J. S. 1294-1296; 4 R. C. L. 1184, §§606-607; *Carpenter* v. *B. & A. R.R. Co.,* 97 N. Y. 494, 497-501; *Steamboat Co.* v. *Brockett,* 121 U. S. 637, 645-646; *Giblett* v. *Garrison, etc.,* 232 N. Y. 618, 619; *Ferry Companies* v. *White,* 99 Tenn. 256, 257-272, 38 L. R. A. 427; *Shaw* v. *C. & G. T. R. Co.,* 123 Mich. 629, 631-637; *Kuhlen* v. *B. & N. S. R. Co.,* 193 Mass. 341, 342-351; *Putnam* v. *B. & S. A. R.R. Co.,* 55 N. Y. 108, 112-119; *Lynch* v. *N. Y. Cent. & H. R.R. Co.,* 8 A. D. 458, 461-464. In view of this, it is conceivable that the purported limitation of the carrier's liability was intended to apply only in respect to the acts of those NOT in its own service, such as fellow passengers or strangers, and NOT AS TO ACTS OF ITS OWN AGENT OR SERVANTS. Yet, there is nothing anywhere in the Warsaw Convention and the transportation contract (R. 62-68) to indicate plainly or specifically whether their limitation provisos are to apply to either type or category of liability. Nor are there any plain or crystally clear words to be found therein to show whether the purported restriction of the carrier's liability relates to *any negligent acts* of the carrier's *managerial* agents, as distinguished from its *subordinate* agents or servants. (Cf. *Perkins, etc.* v. *N. Y. C. R.R. Co.,* 24 N. Y. 196, 203-206, 213-214, where the New York Court of Appeals held that a restriction of defendant's liability on account of *"negligence"* but otherwise couched in broad and general terms, applied only to negligent acts of defendant's subordinate servants and not to those of its managing agents. Accord: *Lee* v. *The Village, etc.,* 40 N. Y. 442, 451; *Anderson* v. *Erie R. R. Co.,* 171 A. D. 687, 693 [3rd Dept. 1916] affd. in 223 N. Y. 277 [1918].) In these respects the language of the foregoing provisions of such Warsaw Convention and transportation contract (R. 62-68) is too

general and vaguely broad to be enforceable as to respondent's *own acts of negligence.* (*The Caledonia,* 157 U. S. 124, 127; *The Majestic,* 166 U. S. 378, 386; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Compania de Navigacion La Flesha* v. *Brauer,* 168 U. S. 104, 119-120.)

Concerning the provisions of Articles 17, 20, and 22 of the Warsaw Convention, and the transportation contract, (R. 62-68) it may be fairly asked: Do they apply to accidents caused by *gross negligence* of the carrier or only those due to its acts amounting to *ordinary negligence?* In this regard, too, nothing plain or specific on the subject can be found in the language of such Articles or anywhere else in such Warsaw Convention and the transportation contract (R. 62-68).

[N.B. In *N. Y. C. R.R. Co.* v. *Lockwood,* 17 Wall (84 U. S.) 357, 382-383, this Court held that the doctrine of the different degrees of due care, with their correlative juridical concepts to denote their absence in given situations, such as "gross negligence", "slight negligence", and "ordinary negligence", "is too firmly settled and fixed in the law to be ignored or changed". Vide, also, *Dalton* v. *Hamilton Hotel Operating Co., Inc.,* 242 N. Y. 481, 489 (1926).]

In the case at bar, one of the indisputable salient circumstances is that neither in the limitation of liability clauses of the Warsaw Convention (49 Stat. Pt. II, pp. 3018-3020) nor in the transportation contract (R. 62-68) itself, will the term "negligence" be anywhere found! Such patent absence of particularity in this respect renders inoperative the clauses of the Warsaw Convention and transportation contract (R. 62-68) purporting to limit respondent's *tortious* liability for damages to petitioners.

In *Wells et al* v. *Steam Navigation Co.,* 8 N. Y. (4 Seld), 375, 379, the New York Court of Appeals declined to enforce a clause purportedly in general and broad terms immunizing defendants from liability. The Court, in that

connection, significantly emphasized the generality of the contract before it, as follows (p. 379):

> *"In this contract nothing is said about negligence."* (Emphasis supplied.)

[N.B. The *Wells* case is cited in the *Nicholas* case (89 N. Y. 370, 374) and in *Hooper* v. *Wells Fargo & Co.*, 27 Cal. 11, 32; and the *Hooper* case is cited with approval by this Court in *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 186-187.]

In connection with Articles 17, 20, and 22, another important consideration presents itself. It is established law that every common carrier is liable for injuries to passengers occasioned by wilful and malicious acts of its agents and employees, even when done *outside the scope of their employment and service,* and deliberately to satisfy their personal animus or purposes, so long as *the occurrence is in connection with the carrier's duty of safe transportation* (10 Am. Jur. 263-264, §§1447-1448; *Stewart* v. *B. & C. R.R. Co.*, 90 N. Y. 588, 591, 594; *Dwinelle* v. *N. Y. C. & H. R. R. Co.*, 120 N. Y. 117, 122, 125-127; *Kansas City S. Ry. Co.* v. *Willsie,* 224 Fed. 908, 909-913). Accordingly, it behooves us to inquire: Were Articles 17, 20, and 22 intended to apply rather to this peculiar category of liability to passengers, or to just negligent acts of the carrier's agents and employees *within the scope* of their employment? The Warsaw Convention and the contract of transportation (R. 62-68) will be searched in vain for any plain or specific expression on this subject. To be sure, Article 25 thereof deals with wilful misconduct, excluding such conduct from the operation of the limitation on the carrier's liability. But its express terms relate solely to (1) the carrier's personal wilful misconduct, and (2) the wilful misconduct of the "agent of the carrier *acting within the scope of his employment*". (Emphasis supplied.)

In *Louisville, New Albany & Chicago Ry. Co.* v. *Nicholai,* 4 Ind. App. 119, 126, the court held that a contractual restriction of liability "not for loss or damage from a particular cause"—but rather *generally as to amount only*—will not preclude recovery of the full amount of a loss arising from the common carrier's negligence.

In *Black* v. *Goodrich Transportation Co.,* 55 Wis. 319, 325-326, there was involved a clause purportedly limiting in general terms the amount of damages for which the common carrier would be liable without reference to or mention *of any particular cause* of damages. Said the court:

> "(p. 325) The courts all seem to hold that a carrier will not be held to have limited his liability against his own or his agent's negligence, *unless his contract expressly so provides.* * * * "

And in *Moulton* v. *St. Paul, M. & M. Ry. Co.,* 31 Minn. 85, 89, the Court said:

> "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, *stand also in the way of any arbitrary preadjustment of the measure of damages,* where the carrier is partially relieved from such liability * * *." (Emphasis supplied.)

Accord: 10 Am. Jur. 121, §1149; Moore on Carriers, Vol. 1 (2nd Ed. 1914), p. 497; *New Jersey Navigating Co.* v. *Merchants Bank,* 6 How. (47 U. S.) 344, 382-384; *Inland Waterways Corp.* v. *Hallett, etc.,* 52 Fed. (2d) 13, 16 (C. C. A. 8th, 1931); *Burrus, etc.* v. *Chicago, etc. et al.,* 131 Fed. (2d) 532, 534-535 (C. C. A. 10th, 1942) cert. den. in 318 U. S. 773; *Saunders* v. *Southern Railway Co.,* 128 Fed. 15, 20-23 (C. C. A. 6th, 1904); *Central of Georgia Railway Co.* v. *Murphey, et ano.,* 113 Ga. 514, 518-519.

Furthermore, the very pivotal provisos of Article 22 are fatally infected with ambiguity and uncertainly as to the persons affected by the purported limitations of the carrier's liability. Article 22, as previously stated, reads as follows:

> "(1) In the transportation of passengers *the liability of the carrier for each passenger* shall be limited to the sum of 125,000 francs. * * * "

But, *to what liability* does this limitation apply? The liability of the carrier *to or for the benefit of each passenger in his lifetime?* Or the carrier's liability to or for the benefit of the surviving widow and next of kin of a deceased passenger? (Cf. *Clark* v. *Greer,* 86 Fed. 447, 448 [C. C. A. 8th]; *The Chicago, R. I. & P. Ry. Co.* v. *Martin,* 59 Kan. 437, 448, 53 Pac. 461, 464-465, affd. in 178 U. S. 245.)

The word "for" is a preposition and so far as concerns its possible applicable meanings, is thus defined in Funk & Wagnalls' New Standard Dictionary (1941 Ed.):

> "2. With a view to: In order to effect, *reach, benefit,* please etc.,: indicating the *final* cause or *object sought* in the following ways: * * * (3) as *a person whose welfare or enjoyment is desired,* or as a wished for event; opposed, in general, to against; *in favor of or behalf of;* * * *
>
> * * * * *
>
> "4. With reference or regard to; in relation to; * * * "

Clearly, by specific meaning number 2, subdivision (3) *supra,* of the word "for", the limitations of Article 22 could only apply to the liability of the carrier *for the benefit* of each passenger *in his lifetime* as to personal injuries sustained by him. But by the broad meaning under number 4, *supra,* of the word "for", Article 22 is susceptible of at least two constructions. Reasonably and fairly construed, its proper meaning is that the liability of

the carrier to or for the benefit of each passenger during his lifetime shall be limited to 125,000 francs. On the other hand, it vaguely suggests that the general liability of a carrier regarding each passenger—whatever such generic idea can possibly mean—shall be limited to 125,000 francs, no matter to whom. But, any treaty, convention, or contract which is susceptible of two constructions, one against the common carrier, and the other possibly in its favor, is, in law, ambiguous and uncertain, and must, accordingly, be construed most strongly against the common carrier, and most liberally in favor of claimants. (In this connection see Cardinal Canons of Construction and authorities thereunder in Appendix "A", *infra*.

Of interest, in connection with the question of the ambiguity and uncertainty in Article 22 of the Warsaw Convention as to the persons affected by the purported limitation of the carrier's liability, is the case of *Clark et al.* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th). There decedent was killed while riding as a passenger on a railroad train. The transportation contract between him and the railroad company, in its pertinent provisos, read as follows:

> " * * * and the holder hereof agrees that the company shall not be liable *to him* in any manner as a passenger, or *for any accident resulting to him* from the operation of the train on which he rides, or from the manner of handling the same by the employees of the company; and he further agrees that the company shall not liable *to him* for injury to the person or property of the person using this ticket, unless the same is caused by the gross negligence of the company; and he further agrees that in no case shall the liability of the company exceed the sum of $1,000."

In construing the quoted language of such transportation contract the United States Circuit Court of Appeals held (pp. 448-449):

"• • • Even if it was competent for the deceased to have done so, the contract in question will not bear the construction that he attempted to place a limit upon the amount which might be recovered *by his personal representative, suing for the sole benefit of his widow, children, or next of kin,* in case he received a fatal injury for which his personal representative could alone sue. • • • the agreement upon which the defendant companies rely to limit the damages that may be recovered shows, as we think, that the deceased was contracting solely with reference to a liability of the carrier to himself, *and not with reference to the statutory liability of the carrier to others, in case of his death through the wrongful act, neglect, or default of the carrier.*" (Emphasis supplied.)

Accord: *The Chicago R.I.P. Ry. Co.* v. *Martin,* 59 Kan. 437, 448, 53 Pac. 461, 464-465, affd. in 178 U. S. 245.

Historical Considerations Impelling Acceptance of Petitioners' Contentions.

Historically speaking, the doctrine of restriction of a common carrier's liability originated at Westminster Hall in England in the late 18th Century. (2 Kent's Com. [14th Ed.] 607-608; Moore on Carriers, Vol. I [2d Ed. 1914], §19, p. 463.) However, in the first few years of its operation it was realized that the doctrine tended to relax the high responsibilities and duties imposed by law on common carriers for the good of the general public, and its introduction was exceedingly regretted by the English jurists. (2 Kent's Com. [14th Ed.] 607-608 [1814]; *Down* v. *Fromont,* 4 Camp. 40-41, 171 Eng. Rep. 13-14 where Lord Ellenborough said lamentably [p. 41]: "I am very sorry for the conveniences of trade, that carriers have been allowed to limit their common law responsibility • • •") Accordingly, whenever a common carrier invoked its benefit by means of a mere public notice or special contract, it was applied as a shield to such common carrier "only from extraordinary events, or from

that responsibility by mistake or inadvertence *which belongs to him as an insurer, and not from the consequences of the want of due and ordinary personal care and diligence.*" (2 Kent's Com. [14th Ed.] 607-608; *N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 360, 363-364.)

And when, with the passage of time, the doctrine of restriction of a carrier's liability has gradually extended itself to acts of negligence, the British and American courts have held it in check by consistently invoking the principle of *strictissimi juris.* They have been steadfast in their insistence, for the protection of the rights of the general public, that common carriers express the restriction or limitation of their liability in clear, specific, unmistakable, and understandable terms. (2 Kent's Com. [14th Ed.] 607-608; Moore on Carriers, Vol. I [2d Ed. 1914] §3, p. 428; *Compania De Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 123-124; *Smith, etc.* v. *N. Y. C. R. R. Co.,* 29 Barb. 132, 137-142, affd. in 24 N. Y. 222.)

The Gross Immorality, Impolicy, and Injustice of the Warsaw Convention's Arbitrary Restriction of the TORTIOUS Liability of Air Carriers.

Underlying this vigilant and paternal attitude of the courts is their keen sensitivity to the crying demands of good conscience and fundamental principles of morality and justice to safeguard passengers and their dependent families against irresponsibility and cupidity of the more powerful carriers. It is recognized by the courts that passengers do not stand on an equality with common carriers, and that very often they are at a very unfair disadvantage in dealing with common carriers. (Shearman & Redfield on Negligence, Vol. 13 [Rev. Ed. 1941] §512, p. 1300; *N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 379-380; *Hartford Fire Ins. Co. et al.* v. *C. M. & St. Ry.* Co., 70 Fed. 201, 205-206 [C. C. A. 8th] affd. in 175 U. S. 91; *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 Fed. [2d] 724, 727 [C. C. A. 2d, 1925] which is cited with approval in *Pager* v. *The Pennsylvania R. R. Co.,* 165 Fed. [2d] 56

[C. C. A. 2d, Dec. 1947].) Knowing that passengers must travel and that because of pressure of business or other personal circumstances, they often have insufficient time to make arrangements for their transportation, carriers frequently foist upon passengers unreasonable and unconscionable conditions, such as arbitrary limitations of liability, in the most general, broad, vague, and ambiguous terms. (*N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 361-374; *Hartford Fire Ins. Co. et al.* v. *C. M. St. Ry. Co.,* 70 Fed. 201, 205-206 [C C. A. 8th] affd. in 175 U. S. 91.) But under the law, common carriers must accept and carry all fare-paying passengers without the imposition of any such arbitrary, unreasonable and unjust conditions. (Shearman & Redfield on Negligence [Rev. Ed. 1941] Vol. 13, §494, pp. 1232-1233, §511, pp. 1298-1299; Story on Bailments [8th Ed.] §591, pp. 580-581; *Alexander et al.* v. *Greene,* 7 Hill [N. Y.] 533, 566; *Curtiss Wright Flying Service Inc.* v. *Glose,* 66 Fed. [2d] 710, 712, cert. den. 290 U. S. 696; *Conklin* v. *Canadian Colonial Airways,* 266 N. Y. 244, 246-247.)

It is largely because of such inequality between passengers and the all-powerful common carriers and the paramount duty devolving upon common carriers for public safety, that any condition which arbitrarily or in general, broad, vague, and uncertain terms purports to restrict the liability of common carriers, will be deemed to have been extorted under "duress of circumstances". (*N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 357, 382; Moore on Carriers, Vol. I [2nd Ed., 1914] §9, p. 438.)

The great and vicious evil of such illegal conditions in transportation contracts is their *tendency to reduce considerably* the highest incentives, for the exercise by carriers of due care for the protection of passengers and their dependents. (Richardson on Contracts [1926 Ed.] p. 144, §171; *St. Louis, etc.* v. *Pitcock,* 82 Ark. 441, 447 [1909].)

In this connection the statement of this Court in *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 183, is

particularly apposite. Paraphrasingly and analogously quoted, it is as follows:

> "* * * Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors [passengers and their dependents] and makes common carriage more unreliable." (Bracketed insertion supplied.)

Accord: *N. J. Steam Navigation Co.* v. *Merchants Bank,* 6 How. (47 U. S.) 344, 427; *Smith, etc.* v. *N. Y. C. R. R. Co.,* 24 N. Y. 222, 231.

The evil of such illegal conditions is all the more reprehensible when it is realized that the contracts containing them invariably involve situations "where one person is dealing contemporaneously with several others so that a bargain limiting his liability to one of them is considered to have a tendency to lead to conduct injurious to others." (*Williston on Contracts* [Rev. Ed. 1936] Vol. 6, §1751C, p. 4968.)

The principles of public policy and social justice designed to eradicate arbitrary and unjust restrictions of the *tortious* liability of carriers, are sharply enunciated in *Smith, etc.* v. *N. Y. C. R. R. Co.,* 24 N. Y. 222, 231-232, in these words:

> "* * * The State is interested not only in the welfare, but in the safety of its citizens. To promote these is a leading object of government. Parties are left to make whatever contracts they please, *provided no legal or moral obligations is thereby violated or any public interest impaired;* but when the effect or tendency of the contract is to impair such interest, *it is contrary to public policy and void* * * *." (Emphasis supplied.)

Accord: *Cf. Johnston* v. *Fargo, etc.*, 184 N. Y. 379, 385-386; *Hughes* v. *Penn. R. R. Co.*, 202 Pa. 222, 228 (1902), affd. in 191 U. S. 477.

In the light of the Cardinal Canons of Construction (see Appendix "A", *infra*) and the cases decided by this Court and the various other authorities (see pp. 41-43, 46-52, inclusive, *supra*) the courts, upon principles of morality, public policy, and justice, will not enforce stipulations or provisos in limitation of a common carrier's *tortious* liability where, as in the case at bar, the language of the Convention and the contract (R. 62-68) is not plain and specific so as to enable passengers to comprehend unmistakeably the particularly ground or category of liability which is limited—*i. e.*, (a) ordinary negligence, or (b) gross negligence of the carrier, his managerial agents and his subordinate employees, or (c) negligent or wilful acts of fellow passengers and strangers, or (d) wilful and malicious conduct of the carrier's employees when occurring *outside the scope* of their employment but in connection with the discharge of the carrier's duty of safe transportation. And from the *Clark* and *Martin* cases (pp. 50-52, *supra*) it is clear that the Courts will not by implication apply a clause generally limiting liability so as to affect the distinct and independent property rights of a deceased passenger's surviving widow and next of kin in the damages recoverable for his wrongful death.

Accordingly, Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) are void and unenforceable to limit defendant's *tortious* liability for damages.

POINT V.

The Garcia and the three other Warsaw Convention cases cited by respondent are sui generis and, therefore, none of them is decisive of the distinctly new issues at bar.

The Garcia Case.*

In that case no question concerning the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, *under the Seventh Amendment,* and the legal effect of such *particular unconstitutionality* upon the transportation contract (R. 62-68) at bar, was presented to, or considered and determined by, the Special Term Court, the Appellate Division, or the Court of Appeals.

The only constitutional questions therein raised and determined specifically related to Article 1, Section 8, Cl. 3, and the Fifth Amendment of our Federal Constitution. *Under these particular divisions* of our Federal Constitution, plaintiffs contended that the Warsaw Convention was void as *a whole* because it infringed the exclusive commerce powers of Congress to act on its subject matter, and that it deprived plaintiffs of their property rights without due process of law. Plaintiffs there contended also that such Warsaw Convention was not self-executing, and was, therefore, void *in its entirety.*

There, too, no question as regards the construction and the unenforceability of the vaguely broad, ambiguous, and uncertain terms of Articles 17, 20, and Subdivision (1) of Article 22 of the Warsaw Convention, and the transportation contract (R. 62-68) at bar, was presented to, and considered and determined by, the Special Term or the appellate courts.

---

*183 Misc. 258, affid. in 269 App. Div. 289 (Sec. Dept.), affd. without opinion in 295 N. Y. 852, cert. den. for want of final judgment in 329 U. S. 741; and related case in 274 A. D. 996 (Sec. Dept.), leave to appeal denied by Court of Appeals on April 14th, 1949, unreported officially, cert. den. finally in 338 U. S. 824.

The Wyman Case.

(181 Misc. 963, affd. without opinion in 267 App. Div. 947 (1st Dept.), affd. without opinion in 293 N. Y. 878, cert. den. in 324 U. S. 882.)

There, too, as in the *Garcia* case, no question concerning the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention under the Seventh Amendment, and the legal effect of such particular unconstitutionality upon the transportation contract (R. 62-68) at bar, was presented to, or considered and determined by, the trial court or the appellate courts.

In that case, no question as regards the construction and the unenforceability of the vaguely broad, ambiguous, and uncertain terms of Articles 17, 20, and Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) at bar, as urged by petitioners herein, was presented to, or considered and determined by, the trial court or the appellate courts.

Patently, the trial court's holding (p. 964) that the Warsaw Convention became "part of the law of the land superseding state law", is founded on nothing more than a sweeping general assumption of the impregnability of such Warsaw Convention to all possible serious objections to its constitutionality and validity. There at the trial plaintiffs predicated their entire case upon the exception (Art. 25, subd. [1], 49 Stats. at Large, Pt. II, 3000, 3020), in such Warsaw Convention—*i. e.*, defendant's wilful misconduct—and upon that ground, principally, sought to impose unlimited liability on defendant.

There, as it happened, the trial court found that plaintiffs failed to prove not only wilful misconduct, but *any negligence* whatever. The trial court likewise found that defendant was not "able to offer any proof in rebuttal of the presumption of liability (Art. 20)" (p. 965). In that situation, therefore, the trial court resorted to the presumption of negligence afforded by Article 20 of such Warsaw Convention to preclude dismissal of plaintiffs'

case. And being without benefit of the particular serious objections urged in the case at bar, regarding the invalidity of the purported limitations of defendant's liability, the trial court awarded a judgment to plaintiffs merely for the amount prescribed in such Warsaw Convention.

In the absence of any opinions in the appellate courts, the affirmance of the judgment of the trial court must be regarded as restricted to the precise issues necessarily decided by such trial court.

The Ross Case.

(299 N. Y. 88.)

That case involved a question of whether a passenger's ticket was delivered to plaintiff as required by Article 2 of the Warsaw Convention. None of the new and serious legal questions in the case at bar was presented therein. It is noteworthy, however, that the strong dissent by Judge Albert Conway, with the concurrence of Judge Edmund H. Lewis, in that case (pp. 99-112) reveals a lamentable judicial awareness of, and discontentedness with, the extreme harshness and injustice of the limitation of liability for tortious acts of common air carriers as prescribed in the Warsaw Convention.

The Indemnity Insurance Case.

(58 Fed. Supp. 338.)

There, too, as in the *Wyman* case and the *Garcia* case, none of the serious objections presented in the case at bar was raised or considered and decided. The only constitutional questions before the Court were those specifically relating to Article I, Section 8, Cl. 3, and the Fifth Amendment of our Federal Constitution. The decision there is consequently of no greater scope than the *Garcia* case.

The mere existence of prior decisions upholding the constitutionality of any legislative act is of no significance

to a subsequent case where it is sought to test the constitutionality of the same act upon entirely *new and different* grounds.

As stated by this Court in *St. Louis R. R.* v.. *Terre Haute R. R.*, 145 U. S. 393, 403-404:

> "* * * Upon questions discussed in the opinion and not necessary to the judgment, *or not considered* at all, the case cannot be regarded as a decision because, as observed by Mr. Justice Curtis speaking for this Court, *'to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.' Carroll* v. *Carroll*, 16 How. 275, 287." (Italics supplied.)

Accord: *Bowman* v. *Mutual Benefit Health & Accident Ass'n*, 99 Fed. (2d) 856, 858 (C. C. A. 8th, 1938), which clearly emphasizes the limitations on the doctrine of *stare decisis; Dougherty* v. *Equitable, etc.*, 266 N. Y. 71, 88; *Cf. Realty Revenue Corporation* v. *Wilson, etc.*, 181 Misc. 802, 804 (N. Y. Supreme Court, Walter, *J.*, 1943); *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 414, 415; *Municipal Gas Co., etc.* v. *The Public Service Commission*, 225 N. Y. 89, 96.

Accordingly, the aforementioned four cases concerning the Warsaw Convention are *sui generis*, and, therefore, none of them is decisive of the distinctly new issues at bar.

Conclusion.

The business of the transportation of passengers by air has been established as a successful and lucrative enterprise since two decades ago. As early as 1928—about six years before the United States adhered to the Warsaw Convention—Cardozo, *Ch. J.*, in *Hesse* v. *Rath et al.*, 249 N. Y. 436, 438, judicially observed: "Aviation is today an established method of transportation". In 1933 it was stated in *McCusker* v. *Curtiss Wright Flying Service, Inc.*,

269 Ill. App. 502, 527: " * * * Aviation is no longer an experiment. Great airplane lines are engaged in the transportation of passengers, mail and express". This enterprise has very rapidly grown by leaps and bounds. It now covers the far-flung corners of the world. (Encyclopedia Britannica, Vol. 2 [1942 Ed.] at pp. 804-805, and other Statistical Data on Aviational Progress in Appendix B, *infra*).

While a total of 417,505 passengers was flown for an aggregate of 103,747,249 passenger air miles traversed in 1930, a substantially greater number of 4,380,610 passengers was transported by plane for an aggregate of 1,676,-949,226 passenger air miles traversed. (See Statistical Data on Aviational Progress during the past twenty-six year period in Appendix B, pp. B-3 to B-4, *infra.*) In a word, the aviation industry has attained generally full maturity.

In view of this, there can be no valid reason why common air carriers, including Pan American Airways, Inc., should not sustain their full responsibilities as such to the general public. Certainly, if the general law (see various authorities on pp. 38-39, *supra*) requires domestic air transportation companies, railroads and bus companies to furnish maximum liability to passengers who demand it for tortious accidents, it should also, as a matter of social justice for the protection of such passengers and their families, impose the same obligation upon international air carriers. Subdivision (1) of Article 22 of the Warsaw Convention cannot in law be accepted as establishing an exceptionally harsh rule of limited tortious liability. To do so would mean nothing less than a reckless subversion of basic juridical concepts in our jurisprudence and transcendental considerations on the values of human life and the high duties resting on common carriers for its preservation. Subdivision (1) of Article 22 is clearly repugnant to the Seventh Amendment of the United States Constitution, and, therefore, invalid. The presumptions of the law safeguard the rights of the general public under the Seventh Amendment. (16 R. C. L. 217, §34; 35 C. J. 202,

§11 [left col.]; *Hodges* v. *Easton,* 106 U. S. 408, 412.) Moreover, Subdivision (1) of Article 22 and the transportation contract (R. 62-68) are fatally infected with vagueness, uncertainty, and ambiguity. Such stipulations of limited liability must be strictly construed against the air carriers and most liberally in favor of passengers and the general public. In the case at bar, the paramount guide to judicial decision is a time-honored principle expressed in *Broom's Legal Maxims* (10th Ed., 1939) at page 1:

> "*Salus Populi Est Suprema Lex.* (XII Tables Bacon Max. reg. 12)—Regard for the public welfare is the highest law."

The same legal fundament is tersely stated by the juristic luminary, Benjamin N. Cardozo, in *The Nature of the Judicial Process* (1921 Ed.) at page 66:

> "The final cause of law is the welfare of society. The rule that misses its aim cannot *permanently* justify its existence. * * *" (Emphasis supplied.)

Certainly, this principle is in no way transcended by the rule that a treaty or convention, *if* found to be in all respects constitutional, is the law of the land. (Art. 6, Cl. 2, 2 U. S. Const. Anno. 692.) For it pervades the judicial process controlling the construction of a treaty or convention and the judicial determination of the scope of its validity.* (See Cardinal Canons of Construction applicable

*In this connection, see "The Supreme Law, The Law of Right and Reason" an illuminating article by Honorable Harold P. Burke, United States District Judge in the Western District of New York, in the Sept. 23 and 26, 1949 issues of the New York Law Journal, pp. 582, 598. Such article cites several decisions of this Court as illustrations of alert and profound judicial regard for the natural law and "immutable principles of justice" as paramount considerations under our Federal Constitution. Some of the cases cited are: *Holden* v. *Hardy,* 169 U. S. 366, 289-390; *Herbert* v. *Louisiana,* 272 U. S. 312, 316; *Girouard* v. *U. S.,* 328 U. S. 61, 68 (1945), and *The Slaughter-House* Cases, 16 Wall. (83 U. S.) 76).

to all treaties and conventions, statutes and contracts, in Appendix "A", *infra.*) And by all the standards of law and justice favoring the public welfare, the conclusion is inescapable that Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) are void and unenforceable to limit the tortious liability of defendant, Pan American Airways, Inc., for damages.

Accordingly, for all the reasons stated herein and in the accompanying petition, and in the interests of justice, a writ of certiorari should be granted.

Respectfully submitted,

HAROLD J. SHERMAN,
Attorney for Petitioners.

Appendix A.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Cardinal Canons of Construction Controlling Warsaw Convention and Transportation Contract Thereunder.*

*These cardinal canons of construction are to be considered in connection with petitioners' argument under Point IV at pp. 40-55, *supra*, of the annexed brief.

Cardinal Canons of Construction Controlling Warsaw Convention and Transportation Contract Thereunder.

For purposes of properly construing and fairly ascertaining the sense and meaning of the pertinent provisos of the Warsaw Convention and the transportation contract, (R. 62-68) and determining the true legal effect of Subdivision (1) of Article 22 thereof, resort should be had to the following illuminating cardinal canons of construction.

1. A treaty or convention of the United States, combining as it does the characteristics of an ordinary contract and federal statute, must be construed in the light of the established principles of construction applicable to private contracts and statutes generally.

   Tucker v. *Alexandroff,* 183 U. S. 424, 437;
   Hamilton v. *Erie R.R. Co.,* 219 N. Y. 343, 353;
   Re: *Zalewsky,* 292 N. Y. 332, 336-337;
   Wright v. *Henkel,* 190 U. S. 40, 57;
   U. S. v. *Seufert, etc.,* 233 Fed. 579, 582 (U. S. D. C. Oregon) affd. in 249 U. S. 194;
   Re: *Clerkship of Circuit Court,* 90 Fed. 248, 251, 252.

2. A treaty or convention of the United States must be very fairly and liberally construed, *without the sacrifice of individual rights* and principles of personal liberties, whenever this can be done, in effectuating its true intent and purpose.

   Tucker v. *Alexandroff,* 183 U. S. 424, 437;
   Re: *Zalewsky,* 292 N. Y. 332, 336, 339 (April 1944);
   Hamilton v. *Erie R.R. Co.,* 219 N. Y. 343, 353-354.

3. Whenever it is reasonably possible to do so, a treaty or convention of the United States *must be so interpreted as not to override state laws and principles of public policy or impair private rights* under them. The courts should liberally favor a construction of a

treaty or convention *which is in harmony with existing law, federal and state, on the same general subject.*

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, 143, and leading authorities therein cited;
Re: Zalewsky, 292 N. Y. 332, 339 (April, 1944);
Missouri Pac. R.R. Co. v. *Boone*, 270 U. S. 466, 472;
Re: Clerkship of Circuit Court, 90 Fed. 248, 251-252;
The Cleveland, etc. v. *Blind*, 182 Ind. 398, 424, 105 N. E. 483;
59 *C. J.* 1009;
50 *Am. Jur.* 376, §370; id. 332-336, §339, *et seq.;*
2 Bouvier (Rawle's Revis.) 348;
3 *Sutherland's Statutory Construction*, (3rd Ed. 1943) p. 125, §5901, pp. 130-131, §5903.

4. The intent of the parties to a contract and the general design, purpose, spirit and reason of such contract and its distinct parts are controlling considerations in its interpretation.

Tucker v. *Alexandroff*, 183 U. S. 424, 437;
U. S. v. *Seufert, etc.*, 233 Fed. 579, 582, affd. in 249 U. S. 194;
12 Am. Jur. 772-777;
Williston on Contracts (1936 Revised Ed.), Vol. 3, §618, pp. 1779-1780;
Collins v. *Central Trust Co.*, 133 Misc. 93, 94 (1928), affd. in 229 A. D. 747, affd. in 255 N. Y. 590;
Hamilton v. *Erie R.R. Co.*, 219 N. Y. 343, 353.

5. Accordingly, such contract must be read as a whole, that is to say, every part thereof must be considered and accorded a sensible and fair operation consistent with the general design and object of the whole instrument, so that no clause or sentence therein shall be rendered superfluous, insignificant, or absurd.

U. S. v. *Seufert, etc.*, 233 Fed. 579, 582, affd. in 249 U. S. 194;
Sullivan v. *Kidd et al.*, 254 U. S. 433, 439;
Broom's Legal Maxims (Tenth Ed. 1939) pp. 394, 389-391;
Lau ow Bew v. *U. S.*, 144 U. S. 47, 59;
U. S. v. *Gue Lim*, 176 U. S. 459, 467;
Hamilton v. *Erie R.R.*, 219 N. Y. 343, 353-354;
50 *Am. Jur.* 385, §377.

6. Accordingly, broad, confusing, or contradictory terms and expressions must be harmonized, if reasonably possible, as justice and equity may require so as to give effect to the main objects and general intendment of the instrument *in conformity with established principles of existing law,* and toward such end whenever justice and equity should make it reasonably necessary, *ordinary words will be given a restricted or special signification and application.*

12 *Am. Jur.* 772-775; 50 id. 372-379, §368, *et seq.;*
Williston on Contracts (1936 Rev. Ed.) Vol. 3, §618, p. 1779;
Broom's Legal Maxims (1939, Tenth Ed.) pp. 389-390, 394;
U. S. v. *D. & H. Co.*, 213 U. S. 366, 412;
Hawaii v. *Mankichi*, 190 U. S. 197, 212;
Riggs et al. v. *Palmer et al.*, 115 N. Y. 506, 509;
Olson v. *Jordon et al.*, 181 Misc. 942, 946 (July 1944);
Atwater & Co. v. *Panama R.R. Co.*, 246 N. Y. 519, 524;
Collins v. *Central Trust Co.*, 133 Misc. 93, 94, affd. in 229 A. D. 747, affd. in 255 N. Y. 590;
3 *Sutherland's Statutory Construction* (3rd Ed. 1943) pp. 130-131, §5903.

7. It is an established maxim that a legislative act or treaty which *is based or adopted for the benefit of a distinct class of business adventurers acting as com-*

mon carriers, must, when ambiguous, be construed *most strongly against such business adventurers and most liberally in favor of the general public.*

Broom's Legal Maxims (10th Ed. 1939), p. 408, and various leading authorities therein cited, including the following:

Stowbridge Canal Co. v. *Wheeley,* 2 B. & Ad. 792;
Priestly v. *Foulds,* 2 Scott N. R. 205, 228;
Gildart v. *Gladstone,* 11 East 675, 685;
Ribble Nav. Co. v. *Hargreaves,* 17 C. B. 385, 402;
Ware v. *Regent's Canal Co.,* 28 L. J. Ch. 153, 157.

8. A stipulation in any instrument or contract regarding limitations of a common carrier's liability for negligence not being favored by the law, must be clear and unmistakable; and, if ambiguous, will be very strictly and most strongly construed against the common carrier and most liberally in favor of those damnified.

10 Am. Jur. 121, §1149;
N. J. Steam Navig. Co. v. *Merchants Bank,* 6 How. (47 U. S.) 344, 382-384;
N. Y. C. R.R. Co. v. *Lockwood,* 17 Wall (84 U. S.) 357, 367, 374;
Galloway v. *Erie R. R. Co.,* 116 A. D. 777, 779 (2nd Dept.) affd. in 192 N. Y. 545.

Appendix B.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Petitioners' Statistical Data on Aviational Progress During Past Twenty-six Year Period and Specific Years Thereof*

*This Appellate Court may, of course, take judicial notice of such scientific developments and historical facts. *Brown* v. *Piper*, 1 Otto (91 U. S.) 37-44; *Hesse* v. *Rath* (1928) 224 A. D. 344, 345, 230 N. Y. S. 676, affd. in 249 N. Y. 436, 438; *Thrasher* v. *City of Atlanta et al.*, 178 Ga. 514, 517 (1933); *McCusker* v. *Curtiss Wright Flying Service, Inc.*, 269 Ill. App. 502, 527 (1923).

Petitioners' Statistical Data on Aviational Progress During Past Twenty-six Year Period and Specific Years Thereof.

The World Almanic for 1942 at page 277 thus stresses aviation gains in the United States in the year 1941:

> "The 16 scheduled airline operators in the United States carried 3,423,454 passengers during the fiscal year ended June 30, 1941, as compared with 2,368,196 for the previous year. * * * During the fiscal year 121,083,634 miles were flown.
>
> " * * * The domestic airlines carried 3,145,970 revenue passengers during the fiscal year and revenue passenger miles were 1,174,835,025."

This same World Almanac, at page 280, also indicates that in the year 1940, alone, 3,185,278 passengers were carried by air carriers operating domestic and foreign service transportation airplanes, for a total of 1,265,164,059 passenger miles (*i. e.*, at rate of one passenger per mile). And, in this connection, it is stated at page 279 that the safety record for 1940 was 36,127,618 passenger air miles flown per passenger fatality.

Encyclopedia Britannica, Vol. 2 (1942 Ed.), at pages 804-805, states:

> "The air service of the world in the two decades following the World War of 1914-18 progressed so steadily that by 1939 all continents were covered by extensive airline networks, practically every major ocean route was paralleled by at least one air-line service and even the Arctic regions had yielded to substantial experimentation looking toward the eventual establishment of transpolar air services."

In a statistical table the last cited reference work, sets forth the following information on air mileage flown around the world from 1919 to 1939, inclusive (see pp. 804-805, *supra*):

Year	*Mileage Flown*
1919	1,022,000
1920	2,969,000
1921	5,831,000
1922	5,666,000
1923	6,570,000
1924	8,764,000
1925	13,011,000
1926	16,824,000
1927	22,242,000
1928	34,005,000
1929	53,379,000
1930	69,505,000
1931	83,500,000
1932	90,372,000
1933	100,580,000
1934	103,432,000
1935	149,442,000
1936	179,243,000
1937	198,868,000
1938	233,756,000
1939	300,000,000

In air Commerce Bulletin, Vol. 9, No. 11, dated May 15th, 1938, published and issued by the Bureau of Air Commerce of the United States Department of Commerce, the following interesting statistics are given. In 1930 a total of 417,505 passengers was flown for a total of 103,-747,249 passenger air miles traversed (*i. e.*, at the rate of a passenger per mile); and this was done with a safety record of 4,322,802 passenger air miles traversed per passenger fatality.

In a subsequent Air Commerce Bulletin, issued by the Federal Civil Aeronautics Administration in 1942, these statistics are given. In 1941, a total of 4,380,610 passengers was flown for a total of 1,676,949,226 passenger air miles traversed; and this was done with a safety record of 45,322,952 passenger air miles traversed per passenger fatality.

The 1946 Encyclopedia Britannica Book of the Year, commenting on the general progress of aviation during the year of 1945, states (pp. 92-93):

"• • • During the first 11 months of 1945 U. S. carriers in contract services flew 100,544,961 transport miles, 1,751,763,336 passenger miles and 399,928,428 tons miles. With the completion of the major part of the direct war operations in the early part of 1945 it was revealed that in the course of those operations the air lines had flown 8,000,000,000 passenger miles and 850,000,000 cargo ton miles. The distance travelled was the equivalent of 26,000 trips around the globe of the equator.

• • • • •

"International Air Transport—

"During 1945 U. S. flag lines carried approximately 460,000 revenue passengers for an estimated 493,000,000 revenue passenger miles on their international routes. Revenue miles flown were estimated at 32,000,000 and ton miles of mail and cargo were 4,625,000 and 8,336,000 respectively.

"The pattern of postwar operations emerged when three air lines, Pan American Airways, American Airlines, Overseas and Transcontinental and Western Air, were authorized to fly the Atlantic in scheduled commercial service. Operation of those routes was to link the United States by air with the principal centres of Europe, North Africa, the Middle East and India. The Atlantic extensions raised the total international certificate route mileage of U. S. carriers to approximately 106,000 as compared with 57,804 in 1940.

"By the end of 1945 P.A.A. and A.A.O. were operating daily flights each way between the U. S. and the British Isles and plans were underway for a steady extension of service over the entire length of the routes. • • •"